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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 41

SAM UMANS,

Petitioner,

*against*

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

# Supreme Court of the United States

OCTOBER TERM, 1966

No.

SAM UMANA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Sam Umana, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed his conviction for violations of 18 U.S.C. §§ 201 and 201(b) and aiding and abetting violations of 26 U.S.C. § 7214(a)(2).

## The Opinion Below

The opinion of the Court below, which has not yet been officially reported, is found in

## Jurisdiction

The judgment of the Court of Appeals was rendered and entered on October 7, 1966. A timely application for rehearing was made on November 10, 1966 and denied on

November 15, 1966. Upon application of counsel for petitioner, this Court extended the time for filing a petition for a writ of certiorari through January 14, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Questions Presented for Review

1. Is an indictment sufficient if the only evidence before the Grand Jury is the testimony of a Government agent, who had no personal knowledge and who briefly summarized affidavits of witnesses who later testified at trial and were readily available to testify before the Grand Jury?

2. Was it error under the Jenck's Act to refuse to permit petitioner to inspect witnesses' written statements containing admissions that the witnesses committed crimes involving moral turpitude?

3. May a payer of money be an aider and abettor under 26 U.S.C. § 7214(a)(2) which prohibits the receipt of unauthorized payments by Government officials and which necessarily requires the acts of two people?

4. Is Title 18 U.S.C. § 201(*f*) which prohibits a person from giving money to a public official "for the proper discharge of official duty" inconsistent with Title 18 U.S.C. § 201(b) which prohibits the payment of money "corruptly"?

## Applicable Constitutional and Statutory Provisions

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *"

The pertinent text of Title 18 U.S.C. § 201 (as effective until January 20, 1963), 18 U.S.C. § 201(b) and (f) as (effective January 21, 1963), 18 U.S.C. § 2, 26 U.S.C. § 7214(a)(2), and 18 U.S.C. § 3500 is set forth in the supplement.

## Statement of the Case

Petitioner, a certified public accountant, was convicted of aiding and abetting Internal Revenue Service agents in receiving illegal fees (26 U.S.C. §7214(a)(2) and 18 U.S.C. § 2) and of giving money to Internal Revenue Service agents (18 U.S.C. §§ 201[1] and 18 U.S.C. §§ 201(b) and (f)).[2] Three counts of the conviction under 18 U.S.C. § 201(f) were reversed by the Court of Appeals on the ground that they were lesser included offenses of 18 U.S.C. § 201(b).

The Government's case consisted almost entirely of the testimony of the Internal Revenue Service employees who allegedly received money from petitioner. Those employees were named as defendants in this case and, before trial, pleaded guilty to the counts in which they were named but were not sentenced.[3] A brief summary of their testimony follows:

Jeremiah Clyne testified that in about June 1963 petitioner asked him to secure the 1961 tax return of Alphone

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[1] As effective until January 20, 1963.

[2] As effective since January 21, 1963.

[3] The only Government witnesses who were not defendants were Herbert Vannatta, a technical witness who testified about Internal Revenue Service procedure (27a), and Seymour Levine, a former Internal Revenue Service employee, who purported to corroborate the testimony of the defendant Montello on Count 11 and who had pleaded guilty in another case but, as of the time of trial, had not been sentenced (91a, 97a).

and Ethel Jacs (33-34a).[1] Clyne, who audited the return on June 14, 1963 in petitioner's presence, disallowed $700 in deductions after studying substantiation which petitioner produced (36a). On or about July 1, 1963, according to Clyne, after the taxpayers agreed to the disallowance, petitioner gave him about $75 (37a).

Thomas Ellington testified that petitioner represented taxpayers, Leo T. and Catherine C. Higdon in the September 27, 1961 audit of their 1960 tax return (42-43a). At the audit, travel and entertainment expenses of $600 and contributions of $400 were disallowed (45a). Petitioner had substantiation for part of the claimed travel and entertainment expenses and contributions (46a). After the audit, according to Ellington, petitioner left an envelope containing $20 or $25 on his desk (46-47a).

Louis R. Deitsch testified that petitioner was the taxpayers' representative in the audit of the following tax returns conducted on the following dates:

(a) 1959 return of Leo and Catherine Higdon audited on January 11, 1961.

(b) 1959 return of Michael F. and Alice Mahony audited on January 14, 1961.

(c) 1959 return of Seward and Madeline Woodard audited on January 17, 1961.

(d) 1960 return of James B. and Mary Lockhart audited on September 27, 1961.

(e) 1961 return of David and Maizie Rubenstein audited on December 13, 1962.

(f) 1961 return of David T. and Mary T. Warner audited on December 13, 1962 (52-54a).

According to Deitsch, before each audit petitioner asked Deitsch to pull the case from the file and they "could work

[1] References with the suffix "a" are to petitioner's appendix.

something out together on it" (54-55a). In each instance they agreed upon a disallowance (56a). After each taxpayer consented to the disallowance and the audit was concluded, petitioner gave Deitsch an envelope containing $50 for each case (57-58a).

Jeremiah Ryan testified that petitioner represented taxpayers Howard and Olive Shank in the June 20, 1961 audit of their 1960 tax return (65-66a). He said that at the audit petitioner said that if they could make an adjustment on one of the items, perhaps he could give something to Ryan (66a). Travel and entertainment expenses in the amount of $1,100 were disallowed (67a). After the taxpayers consented to the disallowance, according to Ryan, petitioner gave Ryan $50 (68-69a).

Ryan also testified that petitioner represented taxpayers in the October 2, 1963 audit of the 1962 tax return of Arthur and Marguerite Mountrey (69-70a). Travel and entertainment expenses of $400 were disallowed (70a). After audit, according to Ryan, petitioner gave him an envelope containing $50 (71a).

Jeanne Lupesco was introduced to petitioner by Leo Weissberg, her group chief (79-80a). She testified that petitioner represented the taxpayer in the December 1962 audit of the 1961 tax return of Robert and Shirley Jennings (80a). Lupesco disallowed $200 in contributions and $850 in travel and entertainment expenses (83a). At the audit, according to Lupesco, petitioner offered her $75 and after the audit, when the taxpayer had consented to the disallowance, petitioner gave her $75 (82-84a).

Seymour Levine, an Internal Revenue Service employee who was not named in this indictment, and Lawrence Montello who was named, both testified about the audit of the 1961 tax return of Richard and Joanne P. Hurley (94a, 99a). Levine, who was a group chief, testified that petitioner asked him to give the Hurley return to an auditor

"who would not be too rough and who could do a quick audit, not waste too much of his time" (93a). Levine assigned the return to Lawrence Montello, one of the agents in his section (94a). Levine testified that between January 28, 1963, when the return was assigned, and February 4, 1963 when the taxpayers consented to the disallowance, petitioner gave Levine two envelopes containing $50 each (93-95a).

Montello testified that Levine assigned the Hurley return to him, told him it was petitioner's case and said that he would be taken care of (99-101a). Montello testified that between January 28, 1963 and February 4, 1963 Levine gave him $50 (102-03a).

None of the witnesses who testified at trial appeared before the grand jury that indicted petitioner,* and the District Court refused to permit petitioner to inspect the Grand Jury minutes to determine what, if any evidence, the Grand Jury heard to support the indictment (106a). The Government, in its brief to the Court of Appeals, admitted that the evidence before the Grand Jury consisted entirely of the testimony of a Government agent who "briefly summarized" affidavits which had been executed by the Government witnesses who later testified at the trial.** The Government in its brief also admitted that "the availability of the Government witnesses prior to the trial and the indictment was well known to the court, as was their willingness to cooperate in supplying evidence of illegal bribes."

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*Many of the witnesses testified before a different grand jury about matters unrelated to this case. (See 49a-50a, 106a.)

**The Government's brief (p. 24) states: "The procedure followed before the grand jury was as follows: The Government called as its witness an agent of the Internal Revenue Service who testified that certain persons (the Government witnesses at trial) had executed affidavits in connection with an investigation relating to Umans. The agent then briefly summarized the portions of the affidavits relating to the illegal payments made by Umans."

## Reason for Granting the Writ

1. A Government agent's "brief summary" of witnesses' affidavits, being the entire grand jury testimony, is insufficient to support an indictment.

The Government has conceded and the Court of Appeals has found that "the indictment was based upon testimony of an Internal Revenue agent who summarized for the grand jury the contents of various affidavits of the witnesses who later testified at appellant's trial" (Supp. p. 36).[1] Whether or not such evidence is sufficient to support an indictment will affect not only this case but innumerable other cases because the Government, interpreting *United States* v. *Costello*, 350 U. S. 359 (1956), in the broadest possible way, has been making a practice of presenting this type of evidence to grand juries and the accused is without an effective remedy to compel the Government to produce other evidence. See, for example, *United States* v. *Payton*, 363 F. 2d 996, 1,000 (2d Cir. 1966), in which the dissenting opinion referred to the grand jury testimony as "shoddy merchandise". See also, *United States* v. *Borelli*, 336 F. 2d 376 (2d Cir. 1964), cert. den. 379 U. S. 960 (1965); *United States* v. *Heap*, 345 F. 2d 170 (2d Cir. 1965). Indeed, in this very case the Court of Appeals, while relying upon *Costello* to support the indictment, recognized "that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent" (Supp. p. 36).

We ask the Court a) without disturbing *Costello* to reverse the conviction below because the evidence before the grand jury was so unreliable that it failed to rationally es-

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[1] "Supp." references are to the supplement following this petition.

tablish the facts, or b) alternatively, to review the decision in *Costello* and to formulate a rule requiring a minimum standard of evidence to be presented to grand juries either under the Fifth Amendment to the Constitution or under this Court's supervisory power over federal courts.

a) *Costello* v. *United States*, *supra*, is not necessarily controlling. In *Costello*, a complex income tax case, the witnesses before the grand jury were Government agents with hearsay knowledge who summarized facts given by 144 witnesses, 350 U. S. at 360, and subsequently testified at trial, giving much of the same information as they gave to the grand jury. "At the trial, with preliminary testimony laying the foundation for it, the same testimony constituted an important part of the competent evidence upon which the conviction was obtained" 350 U. S. at 365.

In the instant case, a Government agent briefly summarized relatively simple affidavits of witnesses who later testified at trial. There was no way to qualify this double hearsay testimony at trial nor was there the same practical reason for summarizing testimony which existed in *Costello* namely, to avoid summoning to the grand jury 144 witnesses whose testimony would have to be summarized to make it meaningful in any event.

The instant case is one of the many examples in which the Government, relying upon a broad reading of *Costello*, has developed a pattern of consciously attempting to avoid having witnesses with personal knowledge testify before grand juries. At times, the Government, instead of having a person with personal knowledge testify before the grand jury, has a Government agent who interviews that person testify. *United States* v. *Borelli*, *supra*, at 391. See also *United States* v. *Payton*, *supra*. At least in those cases, in the course of the interview, the agent has an opportunity to assess and later vouch for credibility of the person he interviews. Whether or not the grand jury testimony in those cases is sufficient to rationally establish the facts is

not the issue here because in the present case the evidence before the grand jury was not a summary of an agent's interview with a witness with personal knowledge. The testimony consisted entirely of an agent's brief summary of affidavits of witnesses with personal knowledge. There is no proof in this record that the agent ever spoke to the affiants. On this record, the agent may have merely summarized pieces of paper which were represented to him as being affidavits of persons who allegedly received money from petitioner. As a practical matter, to permit an indictment upon this kind of evidence is, we believe, to give the prosecutor the power to effectively abrogate the grand jury system.

The Government's reason which has been called a "transparently unworthy one" *United States* v. *Payton*, *supra*, at 1,000 (dissenting opinion), for adopting this procedure, is significant because it shows that this is no isolated case, but part of a planned policy designed to obviate the necessity of making grand jury testimony available to defense counsel. It is a policy which, if upheld, will continue and will make a mockery of the right not to be prosecuted except upon a grand jury indictment.

The procedure adopted in this case was obviously designed to avoid the holding of the Court of Appeals for the Second Circuit in *United States* v. *Borelli*, *supra*, that portions of the grand jury testimony of an agent who summarizes his interview with a witness who later testifies at trial must be made available to the defense where there are inconsistencies between the grand jury and trial testimony. In the instant case the testimony is one step removed from that in *Borelli* and the Government successfully argued that the grand jury testimony should not be made available to the defense (106a). While the Government's motivation may ordinarily be unimportant, it is relevant on this petition for certiorari because it shows that, unless halted by this Court, the procedure adopted in

this case, which results in "shoddy merchandise" being presented to grand juries, *United States* v. *Payton*, *supra*, (dissenting opinion) will continue and will become the rule rather than the exception if indeed it is not already the rule. The question of how far the Government should be permitted to go in presenting evidence to a grand jury which, because of its remoteness to any personal dealings with a prospective defendant becomes more and more unreliable, touches innumerable cases and vitally affects the Fifth Amendment right not to be accused of a crime except upon a grand jury indictment. We urge that the presentation of evidence before the grand jury in this case has denied the grand jury its historical function of assessing the likelihood of prosecutorial success and we ask this Court to dismiss the indictment.

b) *Costello* should be reviewed. Alternatively, we ask this Court to review its holding and broad language of *Costello* which has been interpreted to mean that an indictment valid upon its face, returned by a properly constituted grand jury, cannot be attacked by a defendant. See, for example, *United States* v. *Ramsey*, 315 F. 2d 119 (2d Cir.), cert. den. 375 U. S. 883 (1963), in which the Court of Appeals for the Second Circuit rejected a contention that there was "no valid evidence before the Grand Jury upon which an indictment could be founded" and said that *Costello* "precludes by very broad language any judicial inquiry into the sufficiency of the evidence before a Grand Jury". If the grand jury system is to be more than an ancient relic carried over from English Common Law, and if there is to be meaning to the Constitutional requirement that a person shall not be held for a crime unless there is an indictment by a grand jury, then some standard of evidence should exist which an accused may compel the Government to follow. Under the present system a defendant, who has a constitutional right not to be tried except upon a grand jury indictment, must rely entirely

upon the integrity of the prosecutor and the members of the grand jury not to indict upon evidence which does not rationally establish the facts. There is virtually no way for the accused to protect himself from an indictment based upon unreliable or frivolous evidence and thus the accused has an illusory right because it is not coupled with any remedy.

This Court in affirming *Costello* said that historically the grand jury could act on their own knowledge and was free to indict on such information as they deemed satisfactory, 350 U. S. at 362. However, even historically, as the Government recognized in its brief to this Court in *Costello*, there was a "readily understandable reluctance on the part of at least some judges to send affidavits to a Grand Jury as a substitute for live witnesses" (Govt. Br., p. 22). No matter what rule existed historically, we suggest that in the light of modern day experience some enforceable evidentiary standard is necessary. In modern times grand juries, ever ready to indict based upon evidence such as that presented in this case, are becoming nothing more than an investigatory tool of the prosecutor rather than a buffer between the prosecutor and the prospective accused. This case and others similar to it show that grand juries are willing to indict based upon the flimsiest evidence. If the grand jury system is to be abolished as it has been in England since 1933*, it should be by Constitutional Amendment, not by fiat of the prosecutor.

Assuming that an enforceable standard as to the quality and quantity of evidence before the grand jury is desirable, the issue becomes what that standard should be. We believe that an enforceable rule should be formulated which would require Grand Jury indictments to be based upon at least the same qualitative and quantitative evidentiary

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*23 & 24 Geo. 5, c. 35; 5 Halsbury's Statutes of England (2d ed. 1948), pages 1065-1073.

requirements which now exist for probable cause for an arrest or for a search warrant. Historically, it has always been and still is the Grand Jury's function to determine whether or not there is "probable cause" to hold a man for trial. See *Giordenello* v. *United States*, 357 U. S. 480, 487 (1958). This Court has through the years developed standards for determining probable cause for an arrest and for a search warrant. For example, hearsay alone is insufficient to establish probable cause for an arrest; the arresting officer must have a substantial basis for crediting the hearsay. *Jones* v. *United States*, 362 U. S. 257 (1960); *Draper* v. *United States*, 358 U. S. 307 (1959). We suggest, at the very least, that a similar standard is appropriate for grand jury proceedings. It is anomalous that a person may be arrested only on probable cause but must suffer the expense and the public humiliation of a criminal trial on something less than probable cause. "A wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased." *In re Fried*, 161 F. 2d 453, 458 (2nd Cir.), cert. dismissed, 332 U. S. 807 (1947).

It has been held that it is unnecessary to establish probable cause for an arrest if the arrest comes as a result of an indictment "because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant." *Giordenello* v. *United States*, *supra*, at 487. However, when one attempts to determine whether or not there was probable cause for the indictment by any standard, he is blocked by the authority of *Costello*. If a Grand Jury determination conclusively establishes probable cause and that determination is based upon unreliable evidence then the Fifth Amendment right to be indicted by a Grand Jury is nothing but a procedural formality.

One of the primary reasons given by this Court in *Costello* for refusing to permit petitioner to attack the testi-

mony before the Grand Jury is that "if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed." 350 U. S. at 363. This Court said that "the result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Ibid.*

We believe that experience with the enforcement of other constitutional rights and the experience of those states which do permit inquiry into the sufficiency of the evidence teaches that this problem is not realistic. Thus, for example, hearings are held to determine whether or not there is probable cause for an arrest or a search, the facts and circumstances surrounding a confession, and whether or not evidence was seized illegally. See, for example, *Battle* v. *United States*, 345 F. 2d 438 (U.A.D.C. 1965); *Austin* v. *United States*, 297 F. 2d 356 (4th Cir. 1961); *Nardone* v. *United States*, 308 U. S. 338 (1939); Fed. Rules of Cr. Proc., Rule 41(e).

This Court in sealously protecting the rights of persons to be free from arrests and searches except upon probable cause has not been deterred from enforcing those rights because inevitably litigation is generated over these issues. Similarly, we believe that the argument that additional litigation will result through the enforcement of this right, should be rejected. Indeed, the experience in the State of New York where the standard of evidence before the Grand Jury is quantitatively and qualitatively higher than the one we are seeking in this case, shows that the danger of a flood of unmanageable litigation is illusory. We refer briefly to the procedure in that state merely to show that practical rules can be developed in this area which would protect the rights of the defendant without being burdensome.

By interpretation of the New York Constitution, *People* v. *Glen*, 173 N. Y. 395, 400 (1903), which has substantially the same language as the federal constitution* and by statute, N. Y. Code Crim. Proc. § 249, a Grand Jury may receive none but legal evidence, and an accused may compel that standard by moving to dismiss an indictment, *People* v. *Nitzberg*, 289 N. Y. 523 (1943); *People* v. *Sweeney*, 213 N. Y. 37 (1914). The reported cases in New York show that there has not been a flood of litigation which the New York Courts have found difficult to handle.[10]

In New York when a claim of insufficiency before the Grand Jury is made, the Court first determines whether or not the defendant has supplied extrinsic proof that there is "evidentiary insufficiency." *People* v. *Howell*, 3 A. D. 2d 153, 158 N.Y.S. 2d 985, 987 (1st Dept. 1957), aff'd 3 N. Y. 2d 672 (1958). If there is no extrinsic proof, the inquiry terminates. *People* v. *Pryor*, 11 N.Y.S. 2d 393, aff'd 283 N. Y. 623 (1940), and this, in and of itself, will have a natural tendency to limit the litigation. If, however, there is extrinsic proof of evidentiary insufficiency, then the Court inspects the Grand Jury minutes in camera and dismisses the indictment on its own motion if the evidentiary standard has not been met, *People* v. *Hirschberg*, 37 N.Y.S. 2d 861 (1942); *People* v. *Valerino*, 54 N.Y.S. 2d 521 (1945), or permits the defendant to inspect the minutes and brief and argue the point in those cases where the in camera inspection of Grand Jury minutes

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* Article 1, section 6 of the New York State Constitution provides that, "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury. . . ."

[10] Statutes in certain other states require that only legal evidence be admitted before the grand jury. Under certain of the statutes either because of the language of the statutes or by judicial interpretation defendants have been refused the right to have indictments quashed on the ground that there is insufficient evidence before the grand jury. The citations to the statutes appear in 1 Wigmore, Evidence (3d ed. 1940) 23 fn. 8.

shows that the point is fairly arguable. See *People* v. *Mitchell*, 140 Misc. 869, 251 N.Y.S. 716 (1931); *People* v. *Barnes*, 197 Misc. 477, 98 N.Y.S. 2d 481 (1950); *People* v. *Gentile*, 20 A. D. 2d 412, 247 N.Y.S. 2d 551 (1st Dept. 1964). A similar standard in the federal courts would insure that persons are indicted only upon reliable evidence without forcing prosecutors to produce their entire case before the grand jury.

Because there are no standards under federal law, there is confusion resulting in inconsistent determinations by the Courts. At times the lower courts have refused to permit examination of the grand jury minutes on the ground that *Costello* precludes inquiry into the sufficiency of evidence before the grand jury. See, for example, *United States* v. *Ramsey, supra.* At other times, even after *Costello*, upon defendants' requests, courts have inspected grand jury minutes in camera or have permitted inspection by the defendant, thereby implicitly recognizing that under some circumstances evidence before a grand jury may be insufficient or prejudicial. *Coppedge* v. *United States*, 311 F. 2d 128 (D. C. Cir. 1962), cert. den. 373 U. S. 946 (1963).[11] *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29 (8th Cir. 1963), cert. den. 373 U. S. 904 (1963).[12]

We believe that an enforceable evidentiary standard is necessary if the Fifth Amendment guarantee of indictment by grand jury is to be more than a mockery. We ask the Court to grant this petition and to reverse petitioner's conviction because of the inadequacy of evidence before the grand jury.

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[11] The defendant claimed that perjured testimony was given to the grand jury.

[12] The defendant claimed that the prosecutor conducted himself improperly before the grand jury by accusing witnesses of lying, threatening them with prosecution for perjury, acting belligerently toward witnesses and asserting the very matter under consideration by the grand jury.

2. Statements of Government witnesses, who admitted prior acts involving moral and turpitude, should have been made available to the defense under the Jencks Act.

The Government witnesses at trial were Internal Revenue Service employees who testified about payments allegedly received by them from petitioner. After their direct testimony, the witnesses' written statements in the Government's possession were requested by the defense. However, at the Government's request, on the theory that they were not related to the direct testimony, the Court below refused to make certain of them available (37-38a, 48a, 72-73a, 103a). Those statements were found by the Court of Appeals to "relate to payments received by the Government witnesses from persons other than appellant. . . ." (Supp. p. 37) and thus relate to prior acts of misconduct of the witnesses involving moral turpitude.

We believe that any statement which includes a witness' prior acts of misconduct involving moral turpitude affects his credibility and therefore his direct testimony and that the withheld statements should have been made available to the defense under the Jencks Act. This issue is of general importance because it affects not only this case but every case in which a witness has made a statement admitting a prior act of misconduct involving moral turpitude in which the statement is not turned over to the defense. This would include a large number of cases in which co-conspirators who themselves have been guilty of prior misconduct are the chief witnesses in the case and have given statements to the Government.

This Court has held that statements which relate to the credibility of a witness relate to the subject matter of his direct testimony within the meaning of the Jencks Act and should be made available to the defense. Thus, in *Rosenberg* v. *United States*, 360 U. S. 367 (1959), this Court said that a statement by a witness that she feared her memory as to the evidence at issue was poor should have been made

available to the defense. In *United States* v. *Borelli*, *supra*, the Court of Appeals for the Second Circuit said that a statement that would support impeachment for bias and interest relates to a witness' direct testimony. 336 F. 2d at 393. In the same manner a statement in which a witness admits that he has committed criminal acts involving moral turpitude which would be relevant in determining credibility, *United States* v. *Whiting*, 311 F. 2d 191 (4th Cir. 1962), cert. den. 372 U. S. 935 (1963), relates to the witness' direct testimony and therefore should be made available to the defense. These are precisely the kind of statements which the Court below refused to make available and therefore the judgment of conviction should be reversed.

3. Petitioner was improperly convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two people and with respect to which petitioner could not be an aider and abettor.

Petitioner, in Counts 1 through 9 of the indictment, was convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which, in substance, prohibits Internal Revenue Agents from accepting money otherwise than as prescribed by law for the performance of their duties. Under the circumstances of this case in which petitioner is accused of having paid the money, petitioner may not be convicted of being an aider and abettof because it is impossible to commit the substantive offense without cooperative action. The decision of the Court of Appeals in the instant case, while consistent with a Second Circuit decision, *United States* v. *Kenner*, 354 F. 2d 780 (1965), cert. den. 383 U. S. 958 (1966) and a District of Columbia Circuit decision, *May* v. *United States*, 175 F. 2d 994, cert. den. 338 U. S. 830 (1949), is inconsistent with prior decisions of this Court, *Gebardi* v. *United States*, 287 U. S. 112 (1932), *United States* v. *Katz*, 271 U. S. 354 (1926) and with a prior decision in Second Circuit, *United States* v. *Sager*, 49 F. 2d 725 (1931).

In *Gebardi* v. *United States*, *supra*, in which this Court reversed a Mann Act conviction of a man and the woman he was accused of transporting across State lines for purposes of prostitution, this Court, citing numerous authorities, said that "where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, . . . or under the federal statute." *Id.* at 122. The Court also said that it was resting its decision on the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent. *Id.* at 123.

In *United States* v. *Katz*, *supra*, in which the defendants were indicted for conspiracy to sell intoxicating liquors and the defendants were the buyer and the seller of the liquors, this Court affirmed the quashing of an indictment below and said "but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity." *Id.* at 355.

In *United States* v. *Sager*, *supra*, the Court of Appeals said that "where concert is necessary to an offense, conspiracy does not lie." *Id.* at 727, and on that ground dismissed that count of an indictment alleging concert between several intended givers of a bribe and the intended taker of the same bribe.

The fact that the aforesaid cases were conspiracy cases and the instant case is an aiding and abetting case is a distinction without a difference for if the charge of conspiracy will not lie because the crime itself requires concert of action then the aiding and abetting charge will not lie for the same reason. Cf. *Gebardi* v. *United States*, *supra*, at 119; *Nye and Nissen* v. *United States*, 336 U. S. 613 (1949).

As noted above, *Kenner* v. *United States, supra*, and *May* v. *United States, supra*, are inconsistent with the aforesaid authorities. In *Kenner* an accountant was convicted of aiding and abetting a violation of 26 U.S.C., § 7214(a)(2). In the *May* case, in which a Congressman and a person who paid money to him were indicted for conspiracy to bribe, the Court affirmed the conviction below and rejected the argument that the crime required the acts of two people and a conspiracy charge would not lie.

This Court in *Gebardi* v. *United States, supra*, and *United States* v. *Katz, supra*, examined the intent of the Legislature in determining that a Mann Act conviction of a man and the woman he was accused of transporting across state lines for the purposes of prostitution could not stand, and in determining that a conspiracy to sell intoxicating liquors would not lie if the only persons accused are the buyer and the seller. In the instant case, an examination of the intent of the Legislature, as shown by the language of the statute itself, leads to the same conclusion. Title 26 U.S.C. § 7214(a)(2) provides, among other things, as a penalty, that the offender shall be dismissed from office or discharged from employment. Petitioner not being a public official could not be dismissed from office or discharged from employment.

Moreover, it would have been a simple matter for Congress, before 1963, to enact a statute having the same elements of § 7214(a)(2) encompassing the payer of money without intent to influence official acts rather than just the recipient. This was done in 1963 with the amendment to Title 18 U.S.C. § 201 which now is 201(f). To permit the Government through the use of 18 U.S.C. § 2 to bring in the alleged payer of money as an aider and abettor is inconsistent with the intent of the Legislature and with those cases which hold that a conspiracy count will not

lie, where the crime necessarily requires the acts of two people and those very two people are the accused.

4. Petitioner was convicted of violations of Title 18 U.S.C. § 201(f) (Counts 10, 11 and 12) and, on the identical facts, for violations of Title 18 U.S.C. § 201(b) (Counts 25, 26 and 27), which we believe to be mutually exclusive. Those sections, which became effective on January 21, 1963 and are now just beginning to make their way to this Court for interpretation, are mutually exclusive because § 201(f) prohibits the payment of money "otherwise than as provided by law for the *proper* discharge of official duty" and § 201(b) prohibits the payment of money to public officials "*corruptly*" and "with intent to influence official acts, to wit, the office audit examinations of Income Tax returns . . ." (emphasis supplied). Since the Court charged the jury the elements of both § 201(b) and § 201(f) in substantially the language of the statute (118-19a, 122-23a), the jury was permitted to find, on identical facts, that money was paid for the proper and improper discharge of duty. The Court of Appeals contrary to the above analysis, found that § 201(f) is a "lesser included offense" of § 201(b) and that both sections are consistent (Supp. p. 33).

The question posed—whether or not there are inconsistent elements of these two subdivisions of Title 18 U.S.C. § 201—will affect every case in which a violation of both sections is charged. This will include most accusations of giving money to public officials because if § 201(f) is a "lesser included offense", prosecutors will be motivated to charge both the more and the less serious crimes in the hope that there will be a conviction on at least one of the two sections.

A more complete analysis of the manner in which the above subdivisions of § 201 are inconsistent follows:

Title 18 U.S.C. § 201(f) provides a maximum two-year sentence and a $10,000 fine for the following:

> "(f) Whoever, otherwise than as provided by law *for the proper discharge of official duty*, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . ." (emphasis supplied)

Title 18 U.S.C. § 201(b) provides, among other things, a maximum fifteen-year sentence and a $20,000 fine for the following:

> "(b) Whoever, directly or indirectly, *corruptly*, gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, *with intent*—
>
> (1) to influence any official act or . . ." (emphasis supplied)

In the instant case Counts 10 and 25 charge that on June 14, 1963 petitioner gave J. Clyne, an Internal Revenue Service employee, $75 in connection with the audit of the 1961 income tax return of A. & E. Jacs (8a, 11a). Counts 11 and 26 charge that on January 28, 1963 petitioner gave L. Montello, an Internal Revenue Service employee, $50 in connection with the audit of the 1961 income tax return of R. & J. Hurley (*Ibid.*). Counts 12 and 27 charge that on October 2, 1963 petitioner gave J. Ryan, an Internal Revenue Service employee, $50 in connection with the audit of the 1962 income tax return of A. and M. Mountroy (*Ibid.*).

The only difference between those two series of counts is that Counts 10, 11 and 12 charge under § 201(f) that the money was paid by the defendant for the "proper" discharge of duties of certain Government officials and Counts 25, 26 and 27 allege under § 201(b) that the money was paid by the defendant "corruptly" and with "intent to influence official acts."

The legislative history of these two sections is silent on this subject. However, the two series of counts are inconsistent with each other on their face for it is impossible to pay money for the "proper" discharge of an official act and, at the same time, to pay the same money with a "corrupt" intent to influence the same official act.

Reading the two sections most favorable to petitioner, as we must do because this is a criminal case, *United States* v. *Boston & M. R. Co.*, 380 U. S. 157, 160 (1965), and considering the fact that the charge to the jury contains substantially the same language as the sections quoted above (118-19a, 122-23a), the jury was permitted on the same facts to come to inconsistent conclusions.

If a jury verdict on one count negatives a fact essential to a finding of guilty on a second count, the two guilty verdicts cannot stand. *Marquez-Anaya* v. *United States*, 319 F. 2d 610 (5th Cir. 1963); *Thomas* v. *United States*, 314 F. 2d 236 (5th Cir.), cert. den. 375 U. S. 849 (1963). The fact that the Court of Appeals in this case has vacated the sentences on what it calls the "lesser § 201(f) counts" (Supp. p. 34) does not make the error harmless because it is not the province of the Court to guess what, if any, theory the jury would have adopted had their attention been drawn to the matter, and it is merely conjecture to say that the Court below was not influenced by the double conviction. *Fulton* v. *United States*, 45 App. D. C. 27 (1916); *Poole* v. *United States*, 37 App. D. C. 126 (1911). Accordingly, we respectfully urge that the conviction be reversed.

## CONCLUSION

It is respectfully submitted that the questions raised are of such importance in the administration of criminal law that there should be authoritative determinations of the same by this Court. Accordingly, petitioner asks that this Court issue a writ to review the judgment of the Court of Appeals herein.

Respectfully submitted,

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## SUPPLEMENT

Title 18 U.S.C. § 201 (as effective until January 20, 1963) provides:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

Title 18 U.S.C. § 201 (which became effective January 21, 1963) provides in pertinent part:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any

person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty,

* * * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

* * * *

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;

* * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

*Supplement.*

Title 26 U.S.C. § 7214 provides in pertinent part:

(a) Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * *

Shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

Title 18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 U.S.C. § 3500 provides in pertinent part:

* * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the

witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant and the defendant objects to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

## Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 344—September Term, 1965.
(Argued April 14, 1966 Decided October 27, 1966.)
Docket No. 30168

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

SAM UMANS,

*Appellant.*

Before:

LUMBARD, *Chief Judge,*
WATERMAN and ANDERSON, *Circuit Judges.*

Appellant was named a defendant in 24 counts of a 27 count indictment. In nine of these counts he was charged with aiding and abetting codefendants, Internal Revenue Service agents, in receiving illegal fees, compensation and rewards for the performance of their duties, in violation of 28 U. S. C. § 7214(a)(2) and 18 U. S. C. § 2; in three with giving money to various Internal Revenue Service agents during the year 1963, in violation of 18 U. S. C. § 201(f); in nine other counts with giving money to various agents with intent to influence their official acts during the years 1961 and 1962, in violation of 18 U. S. C. § 201; and in three other counts with corruptly giving money to various agents of the Internal Revenue Service with intent to influence their official acts during the year 1963, in violation of 18 U. S. C. § 201(b). After a jury trial in the United States

District Court for the Southern District of New York, Murphy, *J.*, he was convicted on all 24 counts and was sentenced to two years' imprisonment on each count, the sentences to run concurrently. On appeal he claims various prejudicial trial errors and indictment inconsistencies. Judgment of conviction on 21 of the counts is affirmed. As to each of the three counts alleging violation of 18 U. S. C. § 201(f) it is held that these offenses are lesser included offenses within the criminal acts charged in violation of 18 U. S. C. 201(b), and the entry of judgment of conviction thereon is vacated.

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JOHN S. ALLEE, Michael W. Mitchell, Bernard W. Nussbaum, Asst. U. S. Attorneys, Robert M. Morgenthau, U. S. Attorney, Southern District of New York, *for Appellee.*

EDWARD BRODSKY, William Esbitt, New York City, *for Appellant.*

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WATERMAN, *Circuit Judge:*

Certain taxpayers took deductions on income tax returns for items of travel, entertainment, and the like, in excess of sums that could be substantiated. Appellant, a certified public accountant, then entered into arrangements with auditing employees of the Internal Revenue Service by which appellant made surreptitious cash payments to the employees and, upon audit, the employees disallowed a lesser portion of the deductions than should have been disallowed. Appellant was named a defendant in 24 counts of a 27 count indictment. In nine of these counts he was charged with aiding and abetting codefendants, Internal

Revenue Service agents, in receiving illegal fees, compensations and rewards for the performance of their duties, in violation of 26 U. S. C. § 7214(a)(2) and 18 U. S. C. § 2; in three with giving money to various codefendant Internal Revenue Service agents during the year 1963, in violation of 18 U. S. C. § 201(f); in nine other counts with giving money to the various agents with intent to influence their official acts during the years 1961 and 1962, in violation of 18 U. S. C. § 201; and in three other counts, which set forth the same acts that allegedly violated 18 U. S. C. § 201(f), with corruptly giving money to various agents of the Internal Revenue Service with intent to influence their official acts during the year 1963, in violation of 18 U. S. C. § 201(b). After a jury trial in the United States District Court for the Southern District of New York, Murphy, *J.*, he was convicted on all 24 counts and sentenced to two years' imprisonment on each count, the sentences to run concurrently.

Eight issues have been presented for appellate consideration.

First, appellate maintains that the trial court committed prejudicial error when it did not instruct the jury that in order to convict appellant on the nine counts charging the aiding and abetting of violations of 26 U. S. C. §7214(a)(2) one of the elements of the crimes necessary to be proved was criminal intent. It is not entirely clear whether appellant is maintaining that the charge was deficient as to appellant's intent to aid and abet or that it was deficient relative to the Internal Revenue Service agents' intent to commit the crime. But we note that no objection as to either was made to the charge as given, and no request for a further charge as to anyone's intent was made to the trial court before the jury retired. Therefore, unless there was a charge so deficient that we must consider it to be "plain

error" no objection to the charge will be here countenanced. See Fred. R. Crim. P. 30, 52(b).

With reference to Umans' intent to aid and abet the commission of the nine crimes, the charge given was proper. It followed the standard laid down in *Nye & Nissen* v. *United States*, 336 U. S. 613, 619 (1949) quoting L. Hand, *J.*, in *United States* v. *Peoni*, 100 F. 2d 401, 402 (2 Cir. 1938) that the defendant "in some sort associate himself with the venture, that he participate in it as something he wishes to bring about, that he seek by his action to make it succeed." Further, the jury convicted Umans on other counts that involved the same incidents, and as to those counts the jury was instructed that to find him guilty he must have made the payments with "an intent on the part of the defendant to corruptly influence the employee as to the audit then pending before him." Under these circumstances, we find no inadequacy in the charge as to the need of proof of Umans' intent to aid and abet.

The trial court's charge did not include any instructions that proof of the criminal intent of Internal Revenue Service agents to commit the crimes they committed in violation of 26 U. S. C. § 7214(a)(2) was necessary in order to convict Umans of having committed the crimes he was charged with having committed in aid thereof. This was error, as one's criminal intent is a necessary element of the proof required to convict under that statute. In *United States* v. *Byrd*, 352 F. 2d 570, 572 (2 Cir. 1965) such an omission in a charge was held by this court to be plain error requiring reversal of a conviction despite the absence of an objection at trial. It is also a necessary element of the proof needed to convict one who aids and abets a violation. See *United States* v. *Jones*, 308 F. 2d 26, 32 (2 Cir. 1962).

We do not consider the omission here, however, sufficiently prejudicial, in the absence of an objection at trial,

to require reversal of Umans' convictions on these counts. The agents whose criminal acts Umans was charged with aiding and abetting were prosecuted together with him in the same indictment with him, prior to Umans' trial had pleaded guilty to having committed the crimes, had testified for the Government at Umans' trial, and had admitted their guilt on the stand in the jury's presence. The jury knew the agents had the required criminal intent from the agent's own testimony.

Appellant next claims that, as he had been convicted for committing the same criminal acts under 18 U. S. C. § 201(b) on the one hand, and on the other, under § 201(f), and had also been convicted for the same criminal acts on the one hand under 26 U. S. C. § 7214(a)(2), and, on the other, under 18 U. S. C. § 201, he had been, in both instances, convicted of having committed mutually inconsistent crimes.

It appears that in both claimed inconsistent instances one of the two statutes requires proof of an extra element to convict, a specific intent to influence official action, while the other statute only requires proof that payment was made to an agent in a situation where no payment was necessary.[1] There are no contradictory elements of re-

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[1] Umans claims inconsistency between 26 U. S. C. § 7214(a)(2):

§ 7214. Offenses by officers and employees of the United States

(a) Unlawful acts of revenue officers or agents.—Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * * * *

*(Footnote continued on following page)*

quired proof between the two statutes; only additional elements of proof.

Moreover, there is no merit to appellant's contention that counts under § 201(f) charge appellant with paying the agents "properly" to perform their duties; the section makes it criminal to pay an official a sum which he is not entitled to receive regardless of the intent of either payor or payee with respect to the payment. *United States* v. *Irwin*, 354 F. 2d 192, 198 (2 Cir. 1965), *cert. denied*, 383 U. S. 967 (1966). Therefore, the correct relationship between § 201(b) and § 201(f) is that § 201(f) is a lesser included offense of § 201(b). There is no reason to believe that Congress intended that there should be concurrent

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*(Footnote continued from preceding page)*

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

which contains no element of intent on the part of a person bribing a public official and a provision which does require an intent to influence an official decision, 18 U. S. C. § 201 (as effective until January 20, 1963):

§ 201. Offer to officer or other person

Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either

*(Footnote continued on following page)*

convictions and sentences under both sections, and we should not allow multiple convictions based on the same transactions even where the sentences are concurrent. The sentences on the lesser § 201(f) counts therefore are vacated. This will have no effect upon appellant's term of imprisonment because the vacated sentences are concurrent with those remaining in force.

Appellant also claims prejudicial error because the trial court rejected his requested charge to the jury that he must be acquitted if the jury found that he was coerced by the revenue agents into making the payments he paid them.

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*(Footnote continued from preceding page)*

House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

He also claims inconsistency between 18 U. S. C. § 201(f) (which became effective January 21, 1963):

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;

* * * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

and which contains no element of intent to influence an official act and a provision which does require such intent, 18 U. S. C. § 201(b):

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person

*(Footnote continued on following page)*

The trial court rejected this instruction because he found "not one scintilla of evidence in the case with regard to a shakedown." Our examination of the record confirms this conclusion, and we approve the forthright action of the court below in refusing to give the requested immaterial charge.

In three instances Umans did not pay the Internal Revenue agents until after they had completed their audits on the tax returns in issue, and, as to these payments, Umans claims there is no evidence in the record that the payments were made with intent to influence the agents, as required under 18 U. S. C. § 201 and § 201(b). This claim is without merit. Not only may Umans' similar acts involved in the other counts be considered with respect to his intent in making these three payments, *United States* v. *Baneth*, 155 F. 2d 978, 980 (2 Cir. 1946), but there is evidence in the record that indicates that in each of the

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*(Footnote continued from preceding page)*

who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty,

* * * * * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

three instances an arrangement or understanding with the agent had been arrived at, with payment to follow audit.

Appellant requested the trial judge to inspect the grand jury minutes. The request was refused. Because none of the government witnesses at the trial were witnesses before the grand jury, appellant claims that the trial judge should have inspected the minutes of the grand jury proceedings in order to determine whether there was testimony to support the indictment and whether there were inconsistencies between the testimony before the grand jury and that at trial. Appellant claims that the judge's failure to comply with his request was an abuse of discretion. There is no merit to this claim. The Government reveals that the indictment was based upon testimony of an Internal Revenue agent who summarized for the grand jury the contents of various affidavits of the witnesses who later testified at appellant's trial. While the grand jury testimony was not made available to appellant, these affidavits were furnished to him, and, even if the grand jury minutes had been turned over, the material therein would have added nothing to appellant's arsenal of information. *Costello v. United States*, 350 U. S. 359 (1956), allows the Government to obtain indictments based on hearsay evidence.

While we are not condemning the procedure used here before the grand jury, we think it not amiss for us to state that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to

summon witnesses able to testify to facts from personal knowledge. Appellant's claim of inconsistencies between grand jury and trial testimony is based on *United States* v. *Borelli*, 336 F. 2d 376 (2 Cir. 1964), *cert. denied sub nom. Mogavero* v. *United States*, 379 U. S. 960 (1956), which holds that the defendant is entitled for impeachment purposes to know about inconsistencies between the grand jury and trial testimony of trial witnesses. However, this claim was not raised by appellant at trial, and, even if it were, the claim has no merit, for appellant had the affidavits upon which the grand jury testimony was based.

Appellant maintains that he was prejudiced because statements of government witnesses were not turned over to him pursuant to his request under the Jencks Act, 18 U. S. C. § 3500. These statements were sealed by the court. We have examined these sealed statements and find that they relate to payments received by the government witnesses from persons other than appellant, and the material not furnished to appellant in no way related to him. During the trial appellant cross-examined the government witnesses extensively as to their dealings with other persons. In each instance the witness admitted accepting money from other taxpayers' representatives. Since questions on cross-examination calling for details of other instances of bribery for which the witness had been indicted might properly have been excluded at trial, *United States* v. *Irwin*, 354 F. 2d 192, 198 (2 Cir. 1965), *cert. denied*, 383 U. S. 967 (1966), appellant was not prejudiced by the unavailability of the statements for impeachment purposes. None of the government witnesses were asked on direct examination about payments to them by persons other than appellant, and the withheld material did not directly relate to the subject matter of the witnesses' direct testimony. Under these circumstances, production was not required

by the Jencks Act and the court's order sealing the statements was proper.

Appellant raises the question of the propriety of his being charged with aiding and abetting a violation of 26 U. S. C. § 7214(a)(2) so as to preserve that question for the consideration of the United States Supreme Court in the event of an appeal. He does not urge it before this court, conceding that our opinion in *United States* v. *Kenner*, 354 F. 2d 780 (2 Cir. 1965), *cert. denied*, 383 U. S. 958 (1966), resolves the issue against him.

Appellant's final point that 18 U. S. C. § 201(f) is void for vagueness need not be considered by us for we have vacated his convictions under that section on other grounds.

The judgment below should be affirmed except for the judgment of conviction upon the three counts charging violation of 18 U. S. C. § 201(f), which is ordered vacated.

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 967

SAM UMANS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 28–38) is reported at 368 F. 2d 725.

### JURISDICTION

The judgment of the court of appeals was entered on October 27, 1966. A petition for rehearing was denied on November 15, 1966. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to January 14, 1967, and on January 12, 1967, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



246-839—67

## QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed on the ground that it had been returned on the basis of hearsay evidence.

2. Whether it was error to refuse to make available to the defense under 18 U.S.C. 3500 statements by government witnesses in which they admitted taking bribes from persons other than petitioner.

3. Whether petitioner was properly convicted of aiding and abetting Internal Revenue agents' receiving of fees prohibited by 26 U.S.C. 7214(a)(2).

4. Whether petitioner's convictions under 18 U.S.C. 201(b) and (f) involve mutually inconsistent crimes and must therefore be reversed.

---

## STATUTES INVOLVED

The relevant statutes are set forth in the Appendix, *infra*, pp. 9–10.

## STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on twenty-four counts charging the aiding and abetting of Internal Revenue agents to receive illegal fees, and the giving of money to Internal Revenue agents. Counts 1 through 8, embracing nine separate transactions prior to January 20, 1963, charged petitioner with aiding and abetting the participating Internal Revenue agents in receiving illegal fees in violation of 26 U.S.C. 7214(a)(2). For these same transactions, petitioner was also charged (counts 16 through 24) with giving money to the agents in order to influence their

official acts in violation of 18 U.S.C. 201 (1958 ed.) (in effect through January 20, 1963). Counts 10 through 12 charged violations of 18 U.S.C. 201(f), and counts 25 through 27 charged violations of 18 U.S.C. 201(b), based on three transactions subsequent to January 20, 1963 (A. 6a-11a).[1] The government's evidence (the sufficiency of which is not challenged here) consisted primarily of the testimony of the Internal Revenue agents[2] that they each accepted fees from petitioner ranging from $25 to $100 in connection with audits of the tax returns of petitioner's clients. On October 10, 1965, petitioner was sentenced to imprisonment for two years on each count, the terms to run concurrently. On appeal, the court of appeals reversed the convictions on the three counts under 18 U.S.C. 201(f) on the ground that they were lesser included offenses of 18 U.S.C. 201(b), but in all other respects affirmed the convictions.

## ARGUMENT

1. Petitioner attacks the indictment, which was based upon the testimony of an Internal Revenue agent who summarized for the grand jury the contents of various affidavits of the witnesses who later testified at petitioner's trial (Pet. 6). The court of appeals, although cautioning against excessive use of hearsay in the presentation of a case to the grand jury, refused, on the authority of *Costello* v. *United States*, 350 U.S. 359, to reverse the conviction on that

[1] "A." refers to petitioner's appendix in the court below.

[2] The agents were indicted with petitioner, but prior to trial they had pleaded guilty.

ground (Pet. App. 36-37). This Court recently declined to reconsider the *Costello* decision in *United States v. Payton*, No. 624 Misc., certiorari denied, December 12, 1966, and there is no more reason to do so here. As in *Payton*, this was not a situation where the government could be said to have used a relatively uninformed agent to present its case to the grand jury either because the case was weak, or because the best witness would have made a poor showing. The strong evidence of guilt adduced at trial shows that there could not have been any such devious purpose. The government made clear to the grand jury that it intended to rely upon testimony by former revenue agents that they had been offered by and taken money from petitioner in connection with the audit of his clients' accounts. In view of the number of affidavits[1] to such effect, the grand jury could well have concluded that there was no reason for them to hear each affiant individually before determining that the charges should be aired at a trial.

2. At the conclusion of the direct examination of each of the government's witnesses, petitioner requested statements pursuant to 18 U.S.C. 3500. Statements which related to the direct examination of each witness were made available to petitioner; other statements were, after an *in camera* inspection by the trial court, ordered sealed, because they related to payments received by the various government witnesses from persons other than petitioner (Pet. App. 37).

[1] We note that those affidavits were made available to the defense at trial.

Petitioner argues (Pet. 16-17) that even though those statements did not relate to the direct testimony of the witnesses, they should have been turned over because they might have been helpful to the defense for use in impeaching the witnesses by showing prior acts of misconduct involving moral turpitude. However, as the court below pointed out (Pet. App. 37), petitioner would not have been permitted to cross-examine the witnesses as to details of other instances of bribery for which the witnesses had not been indicted, see *United States v. Irwin*, 354 F. 2d 192 (C.A. 2), certiorari denied, 383 U.S. 967, and so no valid purpose would have been served by allowing him to examine those statements that implicated others in criminal offenses. Petitioner was permitted to ask whether the witnesses had accepted bribes from other persons (see A. 74a, 105a), and he received an affirmative answer to that question. That impeaching answer was all that petitioner was due; he was not entitled to the statements containing details of transactions with others which were irrelevant to the issues at this trial.

3. Petitioner attacks his conviction on the counts charging violations of 26 U.S.C. 7214(a)(2) and 26 U.S.C. 201 (b) and (f). Since petitioner received concurrent sentences on each count, and his challenge does not extend to counts 16 through 24 (violations of 18 U.S.C. 201 (1958 ed.)), these issues need not be considered. *Hirabayashi v. United States*, 320 U.S. 81, 85; *Lawn v. United States*, 355 U.S. 339. They are, in any event, without merit.

*a.* Petitioner argues that he could not be convicted as an aider and abettor of the Internal Revenue agents who received money from him because concert of action between payor and receiver is a necessary element of the offense. He relies upon cases holding that one person cannot be charged with a conspiracy, an offense which by definition involves concert of action (Pet. 18). However, 26 U.S.C. 7214(a)(2) prescribes only receipt by an Internal Revenue agent, of fee or compensation, except as by law prescribed, and therefore concert of action is not necessarily an element of the offense. Under these circumstances, petitioner, who was found to have made prohibited payments to the agents, was properly convicted as an aider and abettor. *United States* v. *Kenner*, 354 F. 2d 780 (C.A. 2), certiorari denied, 383 U.S. 958; *May* v. *United States*, 375 F. 2d 994 (C.A.D.C.), certiorari denied, 389 U.S. 850; see also *United States* v. *Johnson*, 337 F. 2d 180 (C.A. 4), certiorari denied *sub nom. Ellis* v. *United States*, 385 U.S. 846.

*b.* The crimes defined by 18 U.S.C. 201 (b) and (f) are not mutually inconsistent. Section 201(f) (counts 10 through 12) proscribes the giving of money to any public official "because of any official act performed or to be performed" by such official. It requires no proof of intent to influence official action.[1]

[1] Petitioner misreads Section 201(f). In his view (Pet. 20–21), that section proscribes a payment made for the "proper discharge" (Pet. 20) of an official act. However, the quoted phrase, when placed in context, is part of a clause—"otherwise than as provided by law for the proper discharge of official duty"—which clearly was designed only to exclude from the section's coverage whatever payments might be made to an official in the normal course of his duties, *e.g.*, his salary.

On the other hand, Section 201(b) (counts 25 through 27) proscribes the act of *corruptly* giving money to a public official with *intent to influence action*. A finding by the jury that petitioner gave money to the various agents in violation of 18 U.S.C. 201(f) would not preclude the further finding that the money was given corruptly with intent to influence their official action in violation of 18 U.S.C. 201(b). The court below properly held the crime defined by section 201(f) to be a lesser included offense of the crime defined by section 201 (b), and it reversed petitioner's conviction under the former.[5]

## CONCLUSION

For the reasons stated above, it is respectively submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1967.

[5] In light of petitioner's convictions on the other counts, no conjecture (Pet. 22) as to the facts found by the jury was involved in the court's reversal of the conviction under §201(f), after it had decided that the section defined a lesser-included offense. Moreover, the sentences imposed for violations of §201(b) and §201(f) were the same, and were concurrent, as we have noted, with the convictions on counts 16-24.

## APPENDIX

18 U.S.C. 201 (1958 ed.), in effect prior to January 21, 1963, provided:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or an behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

18 U.S.C. 201, 76 Stat. 1119 (effective January 21, 1963) provides in part:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official * * * with intent—
>
> (1) to influence any official act * * *

Shall be fined not more than $20,000 * * * or imprisoned for not more than fifteen years, or both * * *.

* * * * * * *

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official * * * for or because of any official act performed or to be performed by such public official * * *

* * * * * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

26 U.S.C. 7214 provides in part:

(a) Unlawful acts of revenue officers or agents.

Any officer or employee of the United States acting in connection with any revenue law * * *

* * * * * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty * * *

* * * * * * *

shall be dismissed from office or discharged from employment, and upon conviction thereof shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

* * *

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 41

SAM UMANS,

Petitioner,

*v.*

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 41

SAM UMANS,

Petitioner,

*v.*

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONER

### Opinion Below

The opinion of the Court of Appeals (R. 138-147) is reported at 368 F. 2d 725.

### Jurisdiction

The judgment of the Court of Appeals was entered on October 27, 1966 (R. 148). Petitioner's application for a rehearing (R. 149) was denied on November 15, 1966 (R. 157). On November 28, 1966 by order of Mr. Justice Harlan, the time within which to file a petition for a writ

of certiorari was extended to and including January 14, 1967 (R. 158). The petition was filed on January 12, 1967 and was granted on February 27, 1967. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether a Government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, is insufficient evidence to support an indictment.

2. Whether written statements of Government witnesses in which they admit prior criminal acts involving moral turpitude should have been made available to the defense under the Jencks Act when the witnesses testified on direct that they "cooperated" with the Government and had been named as defendants in other cases involving the crimes which the witnesses admitted in their statements.

3. Whether title 18 U.S.C. § 201(f) which prohibits a person from giving money to a public official "for the proper discharge of official duty" is inconsistent with title 18 U.S.C. § 201(b) which prohibits the payment of money "corruptly".

4. Whether petitioner was improperly convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two people and with respect to which petitioner could not be an aider and abettor.

## Applicable Constitutional and Statutory Provisions

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *."

The pertinent text of Title 18 U.S.C. § 201 (as effective until January 20, 1963), 18 U.S.C. § 201(b) and (f) (as effective January 21, 1963), 18 U.S.C. § 2, 26 U.S.C. § 7214 (a)(2) and 18 U.S.C. § 3500 is set forth in the appendix.

## Statement

Petitioner, a certified public accountant, was convicted of aiding and abetting Internal Revenue Service agents in receiving illegal fees (26 U.S.C. § 7214(a)(2) and 18 U.S.C. § 2) and of giving money to Internal Revenue Service agents (18 U.S.C. §§ 201[1] and 18 U.S.C. §§ 201(b) and (f)).[2] Three counts of the conviction under 18 U.S.C. § 201(f) were reversed by the Court of Appeals on the ground that they were lesser included offenses of 18 U.S.C. § 201(b).

The Government's case consisted almost entirely of the testimony of the Internal Revenue Service employees who allegedly received money from petitioner. Those employees were named as defendants in this case and, before trial, pleaded guilty to the counts in which they were named but were not sentenced.[3] A brief summary of their testimony follows:

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[1] As effective until January 20, 1963.

[2] As effective since January 21, 1963.

[3] The only Government witnesses who were not defendants were Herbert Vannatta, a technical witness who testified about Internal Revenue Service procedure (R. 27a), and Seymour Levine, a former Internal Revenue Service employee, who purported to corroborate the testimony of the defendant Montello on Count 11 and who had pleaded guilty in another case but, as of the time of trial, had not been sentenced (R. 91a, 97a).

Jeremiah Clyne testified that in about June 1963 petitioner asked him to secure the 1961 tax return of Alphonse and Ethel Jacs (R. 33-34a). Clyne, who audited the return on June 14, 1963 in petitioner's presence, disallowed $700 in deductions after studying substantiation which petitioner produced (R. 36a). On or about July 1, 1963, according to Clyne, after the taxpayers agreed to the disallowance, petitioner gave him about $75 (R. 37a).

Thomas Ellington testified that petitioner represented taxpayers, Leo T. and Catherine C. Higdon in the September 27, 1961 audit of their 1960 tax return (R. 42-43a). At the audit, travel and entertainment expenses of $600 and contributions of $400 were disallowed (R. 45a). Petitioner had substantiation for part of the claimed travel and entertainment expenses and contributions (R. 46a). After the audit, according to Ellington, petitioner left an envelope containing $20 or $25 on his desk (R. 46-47a).

Louis R. Deitsch testified that petitioner was the taxpayers' representative in the audit of the following tax returns conducted on the following dates:

(a) 1959 return of Leo and Catherine Higdon audited on January 11, 1961.

(b) 1959 return of Michael F. and Alice Mahony audited on January 14, 1961.

(c) 1959 return of Seward and Madeline Woodard audited on January 17, 1961.

(d) 1960 return of James B. and Mary Lockhart audited on September 27, 1961.

(e) 1961 return of David and Maizie Rubenstein audited on December 13, 1962.

(f) 1961 return of David T. and Mary T. Warner audited on December 13, 1962 (R. 52-54a).

According to Deitsch, before each audit petitioner asked Deitsch to pull the case from the file and they "could work

something out together on it" (R. 54-55a). In each instance they agreed upon a disallowance (R. 56a). After each taxpayer consented to the disallowance and the audit was concluded, petitioner gave Deitsch an envelope containing $50 for each case (R. 57-58a).

Jeremiah Ryan testified that petitioner represented taxpayers Howard and Olive Shank in the June 20, 1961 audit of their 1960 tax return (R. 65-66a). He said that at the audit petitioner said that if they could make an adjustment on one of the items, perhaps he could give something to Ryan (R. 66a). Travel and entertainment expenses in the amount of $1,100 were disallowed (R. 67a). After the taxpayers consented to the disallowance, according to Ryan, petitioner gave Ryan $50 (R. 68-69a).

Ryan also testified that petitioner represented taxpayers in the October 2, 1963 audit of the 1962 tax return of Arthur and Marguerite Mountrey (R. 69-70a). Travel and entertainment expenses of $400 were disallowed (R. 70a). After audit, according to Ryan, petitioner gave him an envelope containing $50 (R. 71a).

Jeanne Lupesco was introduced to petitioner by Leo Weissberg, her group chief (R. 79-80a). She testified that petitioner represented the taxpayer in the December 1962 audit of the 1961 tax return of Robert and Shirley Jennings (R. 80a). Lupesco disallowed $200 in contributions and $850 in travel and entertainment expenses (R. 83a). At the audit, according to Lupesco, petitioner offered her $75 and after the audit, when the taxpayer had consented to the disallowance, petitioner gave her $75 (R. 82-84a).

Seymour Levine, an Internal Revenue Service employee who was not named in this indictment, and Lawrence Montello who was named, both testified about the audit of the 1961 tax return of Richard and Joanne P. Hurley (R. 94a, 99a). Levine, who was a group chief, testified that petitioner asked him to give the Hurley return to an auditor "who would not be too rough and who could do a quick

audit, not waste too much of his time" (R. 93a). Levine assigned the return to Lawrence Montello, one of the agents in his section (R. 94a). Levine testified that between January 28, 1963, when the return was assigned, and February 4, 1963 when the taxpayers consented to the disallowance, petitioner gave Levine two envelopes containing $50 each (R. 93-95a).

Montello testified that Levine assigned the Hurley return to him, told him it was petitioner's case and said that he would be taken care of (R. 99-101a). Montello testified that between January 28, 1963 and February 4, 1963 Levine gave him $50 (R. 102-03a).

None of the witnesses who testified at trial appeared before the grand jury that indicted petitioner,[4] and the District Court refused to permit petitioner to inspect the Grand Jury minutes to determine what, if any evidence, the Grand Jury heard to support the indictment (R. 106a). The Government, in its brief (p. 24) to the Court of Appeals, admitted that the evidence before the Grand Jury consisted entirely of the testimony of a Government agent who "briefly summarized" "portions" of affidavits which had been executed by the Government witnesses who later testified at the trial.[5] The Government in its brief also

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[4] The witnesses testified before a different grand jury about matters which are not the subject of the indictment in this case. (See R. 49-50a, 106a.) Transcripts of that grand jury testimony were marked as government exhibits for identification as follows:

| | | | |
|---|---|---|---|
| Clyne ..... | Ex. 105 (R. 39a) | Ryan .... | Ex. 132 (R. 73a) |
| Ellington .. | Ex. 113 (R. 48a) | Lupesco .. | Ex. 139 (R. 85a) |
| Deitsch ... | Ex. 119 (R. 59a) | Levine ... | Ex. 148 (R. 97a) |
| | | Montello .. | Ex. 154 (R. 104a) |

[5] The Government's brief in the Court of Appeals (p. 24) states: "The procedure followed before the grand jury was as follows: The Government called as its witness an agent of the Internal Revenue Service who testified that certain auditors (the Government witnesses at trial) had executed affidavits in connection with an investigation relating to Umans. The agent then briefly summarized the portions of the affidavits relating to the illegal payments made by Umans."

admitted that "the availability of the Government witnesses prior to the trial and the indictment was well known to the court, as was their willingness to cooperate in supplying evidence of illegal bribes" (*Ibid.*).

## Summary of Argument

1. The evidence before the grand jury to support the indictment consists entirely of the testimony of an Internal Revenue Service agent who summarized portions of affidavits of the witnesses who later testified at petitioner's trial. There is no proof that the agent spoke to any of the witnesses, or knew that the pieces of paper he was summarizing were in fact affidavits of these witnesses. This evidence was insufficient by any reasonable standard to support an indictment and, in effect, petitioner was denied his Fifth Amendment right not to go to trial except upon an indictment of a grand jury.

The function of a grand jury is to determine whether or not there is probable cause to hold a man for trial, *Beavers* v. *Henkel*, 194 U. S. 73, 84 (1904) and to stand as a buffer between the public and the prosecutor to insure that persons will not be required to stand trial on criminal charges unless there are reasonable grounds to support the charge. The evidence before the grand jury in this case was insufficient to establish probable cause to obtain a search or arrest warrant because the testifying agent neither spoke from personal knowledge, nor is there any indication that he had any basis for crediting the hearsay which he summarized. *Jones* v. *United States*, 362 U. S. 257, 269 (1960). Since the evidence was insufficient to establish probable cause for an arrest or search warrant, it also was insufficient to cause petitioner to suffer the much more grave consequences of a public indictment and trial.

If an accused may have an indictment based upon substantial evidence quashed because of bias in a class of

people, *Pierre* v. *Louisiana*, 306 U. S. 354 (1939), then surely he should have the same right if the evidence before the grand jury does not meet an enforceable standard at least as stringent as required for search and arrest warrants.

There is no authority in this Court supporting an indictment based upon the evidence presented to the grand jury in this case. *Costello* v. *United States*, 350 U. S. 359 (1956), the last case decided by this Court involving sufficiency of evidence before the grand jury, is distinguishable because there the grand jury heard the testimony of Government agents with hearsay knowledge who summarized facts given by 144 witnesses and subsequently testified at trial, repeating much the same information which they gave to the grand jury with preliminary testimony laying the foundation for it. In the instant case, there was no way to qualify the double hearsay summary which was presented to the grand jury. Nor was there the same practical reason for analyzing testimony which existed in *Costello*, namely to avoid calling to the grand jury a large number of witnesses whose testimony would have to be summarized to make it meaningful in any event.

Since this Court's opinion in *Costello*, prosecutors have been presenting less and less evidence to grand juries until, as shown by this case, the presentation of evidence has become a matter of form rather than substance. The only way to make meaningful a person's constitutional right not to be tried except upon the indictment of a grand jury is to adopt a standard of evidence enforceable by the accused compelling prosecutors, at the risk of having indictments quashed, to present evidence to the grand jury which meets the test of probable cause.

2. It was prejudicial error for the trial court to refuse to permit petitioner under the Jencks Act, 18 U.S.C. § 3500, to inspect certain statements of Government witnesses because (a) the statements withheld from peti-

tioner relate to the credibility of the witnesses and therefore relate to their direct testimony within the meaning of the Jencks Act, and (b) the direct testimony of the witnesses in part relates to payments received by them from persons other than petitioner and their statements, admitting receipt of money from persons other than petitioner, relate to that part of their direct testimony.

The statements in issue are statements in which the witnesses, all of whom were Internal Revenue Service employees, admitted that they took bribes from various accountants other than petitioner. The fact that the witnesses took bribes is relevant to impeach their credibility. *United States* v. *Whiting*, 311 F. 2d 191 (4th Cir. 1962), cert. denied 372 U. S. 935 (1963). Any statement which relates to the credibility of a witness relates to the subject matter of his testimony within the meaning of the Jencks Act, and therefore such statements should be turned over to the defense. *Rosenberg* v. *United States*, 360 U. S. 367 (1959).

In addition, three of the witnesses were asked on direct examination whether or not they had been named as defendants in indictments other than the one before the court. Each of them admitted that they had been so named. Those indictments involve payments received by the witnesses from persons other than petitioner, which is precisely the subject matter of the statements in issue.

Petitioner was prejudiced by not having these statements available to him because (a) two of the seven witnesses who testified that they received money from petitioner were asked no questions on cross-examination about other crimes they committed and they would have been questioned on the subject had the statements been available, and (b) the remaining witnesses were vague in their testimony about other crimes but, we believe, much more precise in the statements which they gave the Government, giving rise to the inference, unavailable to petitioner because he did

not have the statements, that the witnesses were overzealous in their cooperation with the government testifying about events which in fact they could not remember.

3. Petitioner was convicted of violations of Title 18 U.S.C. § 201(f) and on the identical facts for violations of Title 18 U.S.C. § 201(b). Those counts are mutually exclusive because § 201(f) prohibits the payment of money otherwise than provided by law "for the proper discharge of official duty" and § 201(b) prohibits the payment of money to public officials "corruptly" and "with intent to influence any official act. . . ." Thus, the jury was permitted to find inconsistent facts on the same evidence. The charge of the court continued the error and within the framework of the charge the jury was permitted to find inconsistent facts upon the same evidence. Such a verdict should not be upheld because it would be pure speculation for the Court to decide on which if any of the counts petitioner would have been convicted had the jury been properly charged.

4. Petitioner was convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which prohibits Government officials from accepting money otherwise than as prescribed by law for the performance of their duties. Since petitioner allegedly was the payer of the bribe and the crime requires the acts of two people, namely the payer of the bribe and the receiver of the bribe, petitioner may not be convicted of aiding and abetting the receipt of a bribe. This statute, which among other things, provides as a penalty the loss of office, was never intended to encompass a private accountant such as petitioner who did not hold any office. Since it is impossible to commit the substantive offense without cooperative action, it was improper to convict petitioner for aiding and abetting the receipt of the alleged bribe.

# ARGUMENT

## POINT I

**A government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, is insufficient evidence to support an indictment.**

The Government has conceded[6] and the Court of Appeals has found that "the indictment was based upon testimony of an Internal Revenue agent who summarized for the grand jury the contents of various affidavits of the witnesses who later testified at appellant's trial" (R. 145).[7] The Government's brief (p. 24) to the Court of Appeals said that "portions" of affidavits had been summarized. There is no proof in the record that the agent corroborated any of the allegations contained in the affidavits, or spoke to the witnesses to assess their credibility, or even knew whether or not the pieces of paper he was summarizing were in fact affidavits of witnesses. On this record, the agent may have merely summarized portions of pieces of paper which someone told him were affidavits of persons who allegedly received money from petitioner.

The Court of Appeals in this case, while holding that the evidence was sufficient to support the indictment, recognized that:

> "excessive use of hearsay in the presentation of Government cases to grand juries tends to destroy the his-

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[6] In *Mesarosh* v. *United States*, 352 U. S. 1, 3 (1956), this Court based its decision entirely upon representations of the Government.

[7] The Court of Appeals in discussing this point states that the witnesses' affidavits, portions of which were summarized for the grand jury, were furnished to petitioner (R. 145). While affidavits and portions of affidavits of the witnesses were submitted to petitioner, there is no evidence in the record that they were the same affidavits summarized to the grand jury. In any event, the point is irrelevant to this argument because if the evidence before the grand jury is insufficient, the error is not cured by permitting petitioner to inspect the basis for the insufficient evidence.

torical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." (R. 146)

The issue is whether or not the agent's brief summary of portions of affidavits is sufficient, by standards which now exist or should exist to support an indictment. "Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance." *United States v. Johnson*, 319 U. S. 503, 507 (1943).

We urge that the indictment be quashed because (1) an indictment should be supported by substantial evidence which rationally tends to prove the facts, and the grand jury must have, but did not have in this case, at least the same evidence which would support probable cause for an arrest or search, and (2) ideally, the grand jury should have sufficient evidence, excluding all incompetent evidence, to prove a *prima facie* case against the accused at trial. The second suggested standard, considerably higher than the first and not necessary to a holding in this case, would more likely lead to an assessment of whether or not there is a likelihood of conviction (rather than guilt) which logically should be the function of the grand jury. See Note, Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings, 72 Yale Law Journal 590, 592 (1963). Since the second standard is not necessary to a holding here, we will devote the major portion of our discussion on this point to the first standard.

In seeking an order quashing the indictment, we rely on petitioner's Fifth Amendment right not to be "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." If the relief we are seeking does not reach constitutional dimensions, we alternatively ask this Court, in the exercise of its supervisory jurisdiction over lower federal courts, to formulate a standard of evidence designed to avoid indictments based upon insubstantial evidence. *Mesarosh* v. *United States*, 352 U. S. 1, 14 (1956); *McNabb* v. *United States*, 318 U. S. 332, 340-41 (1943).

As we shall show below, the function of the grand jury is to determine whether or not there is "probable cause" to hold a man for trial. The evidence in this case would have been insufficient to establish probable cause to obtain a search or arrest warrant because the testifying agent neither spoke from personal knowledge nor is there any indication that he had any basis for crediting the hearsay which he summarized. *Jones* v. *United States*, 362 U. S. 257, 269 (1960); *Aguilar* v. *Texas*, 378 U. S. 108, 114-15 (1964); *Ventresca* v. *United States*, 380 U. S. 102, 110 (1965). Since the evidence was insufficient to establish probable cause for an arrest or search warrant, it also was insufficient to cause petitioner to suffer the much more grave consequences of a public criminal indictment and trial.

The most recent case in this Court discussing the evidentiary requirements to support an indictment is *Costello* v. *United States*, 350 U. S. 359 (1956)[8], in which an in-

[8] *Lawn* v. *United States*, 355 U. S. 339, 350 (1958) was decided after *Costello*, but there the Court found that petitioner had made an insufficient showing that the grand jury had based its indictment upon illegally obtained evidence and indicated that even if he had, the indictment was sufficient. The question of whether an indictment based upon illegally obtained evidence, which is admittedly rationally persuasive, is far different from the question of whether or not an indictment which does not meet the standard of probable cause is sufficient.

dictment was sustained against a claim of evidentiary insufficiency. There, while the evidence before the grand jury was hearsay, it was substantial evidence which rationally tended to prove the facts and that distinguishes *Costello* from the instant case. *Costello* was a complex income tax case in which the witnesses before the grand jury were Government agents with hearsay knowledge who summarized facts given by 144 witnesses and subsequently testified at trial, repeating much of the same information which they gave to the grand jury. "At the trial, with preliminary testimony laying the foundation for it, the same testimony constituted an important part of the competent evidence upon which the conviction was obtained". 350 U. S. at 365. (Concurring opinion.)

In the instant case, a Government agent briefly summarized portions of relatively simple affidavits of witnesses who later testified at trial. There was no way to qualify this double hearsay at trial, nor was there the same practical reason for analyzing testimony which existed in *Costello*, namely, to avoid summoning to the grand jury 144 witnesses whose testimony would have to be analyzed to make it meaningful in any event. Indeed, in the instant case, while the Court of Appeals cautioned that hearsay should only be used when direct testimony is unavailable, or when it is demonstrably inconvenient to summon witnesses with personal knowledge (R. 146), the evidence shows that each of the witnesses did in fact testify before a different grand jury on matters unrelated to this case (see fn. 4, *supra* at p. 6) and the Government admitted in its brief to the Court of Appeals (p. 24) that the witnesses were readily available before trial.

We believe that consistent with the facts and holding of *Costello*, the indictment here should be quashed because the grand jury had no probable cause, or to put it another way, had "no substantial or rationally persuasive evidence which tended to prove the facts." *Costello* v. *United States*, *supra*, at 364 (concurring opinion). To the extent

that a holding in this case quashing the indictment would be inconsistent with the broad dicta of *Costello*, not necessary for the holding in that case, we urge the Court to reconsider that language and formulate an enforceable evidentiary standard which would require indictments to be based upon substantial rationally persuasive evidence or probable cause. The applicable authorities before and after *Costello*, which we shall discuss below, show how the law has developed to a point where today *Costello* is being interpreted so broadly by some courts that the accused, as shown by the indictment in this case, is effectively denied his Fifth Amendment right to be indicted by a grand jury.

Historically, it always has been recognized that the function of a grand jury is to determine whether or not there is "probable cause" to hold a man for trial. See *Giordenello* v. *United States*, 357 U. S. 480, 487 (1958); *Hurtado* v. *California*, 110 U. S. 516, 552 (1884) (dissenting opinion); *Hale* v. *Henkel*, 201 U. S. 43, 64 (1906); *Beavers* v. *Henkel*, 194 U. S. 73, 84 (1904); *Ex parte Bain*, 121 U. S. 1, 11-12 (1887). See also, *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 599 (1950); *Ex parte United States*, 287 U. S. 241, 250 (1932); 1 Wigmore, Evidence (3d ed.) p. 21; 4 Blackstone Commentaries 303 (Am. ed. 1858) ("sufficient cause").[9] "The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." *Beavers* v. *Henkel*, *supra*, at 84. The purpose of a grand jury investigation is to protect the accused against unfounded or malicious prosecutions by providing that criminal proceedings will not be undertaken without a prior disinterested determi-

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[9] See Kaufman, The Grand Jury—Its Role and Its Powers, 17 F.R.D. 331, 335 (1955); Davis, Precedents of Indictments, 24 (1831); Williams, General Instructions and Charge to the Grand Jury, 9 F.R.D. 649, 650 (1950); Johnson, Charge to Grand Jury, 4 F.R.D. 243, 249 (1945).

nation of probable guilt. See, *Hale* v. *Henkel, supra,* at 59; *United States* v. *Wells,* 163 F. 313, 324 (D.C.D. Idaho 1908); *Beck* v. *Washington,* 369 U. S. 541, 582 (1962) (dissenting opinion); Charge to Grand Jury 30 Fed. Cas. 992, 993, No. 18,255 (CCD Cal. 1872); Charge to Grand Jury, 30 Fed. Cas. 1036, 1038, No. 18,272 (CCSD Ohio 1861); Orfield, Criminal Procedure from Arrest to Appeal 144 (1947).

In *Wood* v. *Georgia,* 370 U. S. 375, 390 (1962), this Court said:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused whether the latter be an individual minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.'"[10]

It would follow logically that similar to arrest and search cases, which are analogous because of the necessity of a finding of probable cause, a standard of evidence in grand jury proceedings would have been developed over the years and that indictments would have been dismissed if the supporting evidence fell below that standard. It is anomalous that a person may be arrested only on probable cause but must suffer the expense and the public humiliation of a criminal trial on something less than probable cause. "A wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased." *In re Fried,* 161 F. 2d 453, 458 (2d Cir.), cert. dismissed, 332 U. S. 807 (1947).

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[10] See generally Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590 (1961).

However, the controversy in the cases until *Costello* was not whether the evidence before the grand jury was substantial or convincing, but whether the evidence was technically "competent" meaning whether or not the evidence would have been admissible at trial. See, for example, *Brady* v. *United States*, 24 F. 2d 405 (8th Cir. 1928). For that reason *Costello* was decided in terms of whether or not the evidence before the grand jury was "competent." It is far more rational to focus, not on whether some technically competent evidence was before the grand jury, but on the question of whether the indictment was returned subsantially upon evidence which was untrustworthy. Indeed, in its brief to this Court (p. 2, fn. 2), in *Costello*, the government suggested it might have been a sufficient answer to petitioner's complaint in that case to say that "the grand jury acted responsibly, on a basis which reasonable men could reasonably deem sufficient to warrant indictment." It does not follow that "incompetent" evidence is unconvincing as Judge Learned Hand noted in the Court of Appeals opinion in *Costello* which said:

> "[Exclusionary rules] apply to evidence that is relevant rationally, but that courts will not accept, not because it does not prove the issue, but it is thought unjust to the opposite party to use it against him, or because it is within some privilege to suppress the truth." 221 F. 2d at 677.

Until *Costello*, as the Court of Appeals in that case noted, there was no decision of this Court dealing directly with the issue of whether an indictment must be quashed because all of the evidence before the grand jury was incompetent. 221 F. 2d at 679. In 1910, however, this Court in *Holt* v. *United States*, 218 U. S. 245, considered the question of whether or not an indictment should be quashed when the evidence before the grand jury consisted of (a) admissions of the accused "obtained under circumstances that made them incompetent . . ." and (b) "very little"

other evidence. In an opinion by Mr. Justice Holmes, the Court, "without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of such an inquiry, the discretion of the trial court is subject to review", held that "there is no reason for reviewing it here." 218 U. S. at 247. The Court said that an indictment is sufficient where evidence before the grand jury "in its nature competent, but made incompetent by circumstances, had been considered along with the rest." *Ibid.*

Federal cases following *Holt* held that an indictment is sufficient when the grand jury hears some competent evidence. See, e.g., *United States* v. *Nunan*, 236 F. 2d 576, 594 (2d Cir. 1956), cert. denied 353 U. S. 912 (1957); *United States* v. *Holmes*, 168 F. 2d 888 (3d Cir. 1948); *Gates* v. *United States*, 122 F. 2d 571, 576 (10th Cir. 1941), cert. denied 314 U. S. 698 (1942); *Tinkoff* v. *United States*, 86 F. 2d 868, 877 (7th Cir. 1937); *Czarlinsky* v. *United States*, 54 F. 2d 889, 892 (10th Cir. 1931), cert. denied 285 U. S. 549 (1932); *Olmstead* v. *United States*, 19 F. 2d 842, 845 (9th Cir. 1927), aff'd without consideration of the point, 277 U. S. 438 (1928); *Murdick* v. *United States*, 15 F. 2d 965, 968 (8th Cir. 1926), cert. denied sub. nom. *Clarey* v. *United States*, 274 U. S. 752 (1927); *Arnstein* v. *United States*, 296 Fed. 946, 948 (D. C. Cir. 1924); *Livezey* v. *United States*, 279 Fed. 496 (5th Cir. 1922); *Anderson* v. *United States*, 273 Fed. 20 (8th Cir. 1921); *McKinney* v. *United States*, 199 Fed. 25 (8th Cir. 1912); *Hillman* v. *United States*, 192 Fed. 264 (9th Cir. 1911). Dicta in some cases suggested the possibility of a holding that an indictment should be dismissed when all the evidence before the grand jury was incompetent. See *Olmstead* v. *United States, supra*; *Murdick* v. *United States, supra*; *Cooper* v. *United States*, 247 Fed. 45, 47 (4th Cir. 1917); *Czarlinsky* v. *United States, supra*; *Gates* v. *United States, supra*; *United States* v. *Holmes, supra*; *United States ex rel.*

*Potts* v. *Rabb*, 141 F. 2d 45, 47 (3d Cir.), cert. denied 322 U. S. 727 (1944); *Friscia* v. *United States*, 63 F. 2d 977, 980 (5th Cir.), cert. denied 289 U. S. 762 (1933). The 8th Circuit adopted such a rule. *Nanfito* v. *United States*, 20 F. 2d 376 (8th Cir. 1927); *Brady* v. *United States*, *supra*. On the other hand, dicta in other cases suggested the contrary, that an indictment is valid when all the evidence before the grand jury is incompetent. See *United States* v. *Beadon*, 49 F. 2d 164 (2d Cir.), cert. denied 284 U. S. 625 (1931), and cases cited therein. This was the somewhat confused background against which this Court decided *Costello* in 1955.

In *Costello* the question presented to the Court by petitioner and the question on which this Court granted certiorari was "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?" 350 U. S. at 359. This Court answered the question in the affirmative.

However, it is important to distinguish the holding of *Costello* from its broad dicta which, coupled with the absence of any enforceable standard, has been interpreted differently by different courts resulting in confusion. The *Costello* dicta has also led prosecutors to present less and less evidence to grand juries until, as shown by this case, the presentation of evidence becomes a matter of form rather than substance.

Confusion has resulted because at times courts, in sweeping language, have refused to permit examination of the grand jury minutes on the ground that *Costello* precludes inquiry into the sufficiency of evidence before the grand jury and therefore an inspection of the minutes would be academic. *United States* v. *Ramsey*, 315 F. 2d 199 (2d Cir.), cert. denied 375 U. S. 883 (1963); *United States* v. *Aviles*, 274 F. 2d 179, 190-91 (2d Cir.), cert. denied 362 U. S. 974 (1960); *United States* v. *Cimino*, 321 F.

2d 509, 512 (2d Cir. 1963), cert. denied 375 U. S. 974 (1964); *United States* v. *Tolub*, 187 F. Supp. 705 (S.D.N.Y. 1960). See also *United States* v. *Labate*, 270 F. 2d 122 (3d Cir.), cert. denied 361 U. S. 900 (1959). At other times courts have inspected the minutes in camera, *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 37 (8th Cir.), cert. denied 373 U. S. 904 (1963); *United States* v. *Lennon*, 148 F. Supp. 492, affirmed 246 F. 2d 24 (2d Cir.), cert. denied 355 U. S. 836 (1957); *United States* v. *Tane*, 29 F.R.D. 131 (E.D.N.Y. 1962), or have permitted inspection by the defendant, *Coppege* v. *United States*, 311 F. 2d 128 (D. C. Cir. 1962), cert. denied 373 U. S. 946 (1963), thereby recognizing that if the evidence did not meet some federal standard the indictment should be dismissed.

The different interpretations of *Costello* have apparently resulted from the difference in approach between the majority and concurring opinions in that case. The holding of *Costello* is simply that hearsay evidence alone will support an indictment. The majority opinion goes further, however, and indicates that the only grounds for quashing are, 1) an indictment invalid on its face, 2) an illegally constituted grand jury, and, 3) a prejudiced or biased grand jury. If this language is taken literally, it would seem to mean that an indictment is not subject to challenge even if the grand jury had before it no rationally persuasive evidence, or indeed, no evidence at all.

It is on this point that Mr. Justice Burton, who concurred, disagreed. An indictment based on no evidence whatsoever is difficult to imagine, and it has been indicated that such an indictment should be quashed. *Duarte* v. *United States*, 171 F. 2d 971 (5th Cir. 1949); *Cox* v. *Vaught*, 52 F. 2d 562 (10th Cir. 1931); *Brady* v. *United States*, *supra*. We have found no case involving no evidence at all, but if the accused has no remedy to insure against an indictment based upon no evidence, then his right to go to trial except upon an indictment is nothing more than an empty phrase.

An accused is constitutionally entitled to indictment by a non-biased grand jury, and may enforce that right by having an indictment quashed if he can show that the grand jury was biased against him. See, *Costello* v. *United States, supra; Lawn* v. *United States, supra; Pierre* v. *Louisiana,* 306 U. S. 354 (1939); *Cassel* v. *Texas,* 339 U. S. 282 (1950). If an accused may have an indictment based upon substantial evidence quashed because a class of people was excluded from grand jury service, *Pierre* v. *Louisiana, supra,* then surely he should have the same right if the grand jury evidence does not meet a standard of evidence designed to insure against frivolous or maliciously motivated indictments.

In *Costello,* Mr. Justice Burton sought to define a standard and thereby to limit the broad language of the majority opinion by affirming the view which Judge Hand had expressed in the 2d Circuit Opinion:[11]

> "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." 350 U. S. at 364.

As noted above, the *Costello* dicta, not only resulted in what appears to be conflicting interpretations, it has also motivated prosecutors to seek and obtain indictments based upon the scantiest evidence as shown by the indictment in this and other cases cited below. A decision of this Court approving the evidentiary standard of this case will, of

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[11] Judge Hand's statement appears in 221 F. 2d at 677.

course, result in future indictments based upon the "bare-bones" formula which the Government used here.

Since this Court's opinion in *Costello*, the Government, relying upon a broad interpretation[12] has developed a pattern of consciously attempting to avoid having witnesses with personal knowledge testify before grand juries. At times, the Government, instead of having someone with personal knowledge testify before the grand jury, has a Government agent who interviews that person testify. *United States* v. *Borelli*, 336 F. 2d 376, 391 (2d Cir. 1964), cert. denied *sub. nom Mogavero* v. *United States*, 379 U. S. 960 (1965). For other cases in which the government substituted an agent with hearsay testimony for witnesses with personal knowledge see *United States* v. *Cimino*, 321 F. 2d 509, 512 (2d Cir. 1963), cert. denied 375 U. S. 974 (1964); *United States* v. *Payton*, 363 F. 2d 996 (2d Cir.), cert. denied 385 U. S. 993 (1966); *United States* v. *Andrews*, No. 30763, 2d Cir., Aug. 9, 1967; *United States* v. *Daly*, 65 Cr. 312, E.D.N.Y., April 28, 1967. At least in those cases, in the course of the interview, or in the course of the investigation, the agent has an opportunity to assess and later vouch for the credibility of the person he interviews or to corroborate, on personal knowledge, some of the underlying facts. Whether or not the grand jury testimony in those cases is sufficient to rationally establish the facts is not the issue here because in the present case the evidence before the grand jury was not a summary of an agent's interview with a witness with personal knowledge. The testimony consisted entirely of an agent's brief summary of portions of affidavits of witnesses.

The Government's reason which has been called a "transparently unworthy one" *United States* v. *Payton*, *supra*, at 1,000 (dissenting opinion), for adopting this pro-

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[12] In *United States* v. *Laughlin*, 226 F. Supp. 112 (D.C.D.C. 1964) the Court characterized the Government's interpretation of *Costello* as "extreme".

cedure, is significant because it shows that this is no isolated case, but part of a planned policy designed to obviate the necessity of making grand jury testimony available to defense counsel. It is a policy which, if upheld, will continue and will make a mockery of the right not to be prosecuted except upon a grand jury indictment. Indeed, even judicial criticism of this procedure has not motivated the government to present other evidence to the grand jury. Thus, in the recent case of *United States* v. *Andrews*, No. 30763, 2d Cir., August 9, 1967, The Second Circuit, citing the instant case and *United States* v. *Payton*, *supra*, said "The presentation of hearsay testimony before the grand jury is clearly permissible, and indictments based thereon are valid indictments under the rule of *Costello* v. *United States*, 350 U. S. 359 (1956), even though recently the practice has been subjected to judicial criticism in this circuit."

The procedure adopted in this case was designed to avoid the holding of the Court of Appeals for the Second Circuit in *United States* v. *Borelli*, *supra*, that portions of the grand jury testimony of an agent who summarizes his interviews with a witness who later testifies at trial must be made avaliable to the defense where there are inconsistencies between the grand jury and trial testimony. In the instant case the testimony is one step removed from that in *Borelli* and the Government successfully argued that the grand jury testimony should not be made available to the defense (R. 106a). While the Government's motivation may ordinarily be unimportant it is relevant here because it shows that unless halted by this Court, the procedure adopted in this case, which results in "shoddy merchandise" being presented to grand juries, *United States* v. *Payton*, *supra* (dissenting opinion), will continue and will become the rule rather than the exception if indeed it is not already the rule. The question of how far the Government should be permitted to go in presenting evidence to a grand jury which, because of its remoteness to

any personal dealings with a prospective defendant becomes more and more unreliable, touches innumerable cases and vitally affects the Fifth Amednment right not to be accused of a crime except upon a grand jury indictment.

The evidence used in this case, insufficient to support a search or arrest warrant, also was insufficient, based upon the above authorities, logic and policy, to support an indictment. However, it has been urged that assuming the benefits of a standard of evidence, there are countervailing policy reasons to prohibit the accused from attacking indictments based upon evidentiary insufficiency. The short answer to each of those arguments is that without an enforceable standard the accused has a right without a remedy and the grand jury, if it is not already, will inevitably become a "rubber stamp" for the prosecutor. Cf. *Aguilar* v. *Texas*, 378 U. S. 108, 111 (1964). "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U. S. 212, 218 (1960). We will now examine the arguments against permitting the evidence before grand juries to be analyzed for sufficiency.

**a. Delay and administrative hardship caused by preliminary hearings to determine the sufficiency of the evidence is no reason to deny to the accused his constitutional right to be indicted by a grand jury.**

This Court in *Costello* said that if indictments were held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the delay would be great, culminating in preliminary trials to determine the competency and adequacy of the evidence before the grand jury. See also, *Holt* v. *United States*, *supra*, at 248; *United States* v. *Morse*, 292 F. 273, 278 (S.D.N.Y. 1922). While that argument may have validity in the context of *Costello* where the question before the Court was

whether or not an indictment based upon substantial evidence which happened to be hearsay was sufficient, the argument surely has no force when considering an indictment based upon insubstantial evidence. We are considering the protection of a right guaranteed by the Constitution, and administrative problems in enforcing that right should not be a reason for the promulgation of a rule which would effectively eliminate that right. Furthermore, an enforceable rule requiring grand juries to indict only upon probable cause, meaning substantial rationally persuasive evidence, has the benefit of being administratively feasible and at the same time reasonably secures the protection of the Fifth Amendment to the accused.

Experience with the enforcement of other constitutional rights and the experience of those states which do permit inquiry into the sufficiency of the evidence teaches that this alleged administrative problem is not realistic. Thus, for example, the federal courts have not been overwhelmed with administrative difficulty in holding hearings to determine whether or not there is probable cause for an arrest or a search, the facts and circumstances surrounding a confession, and whether or not evidence was seized illegally. See, for example, *Battle* v. *United States*, 345 F. 2d 438 (C.A.D.C. 1965); *Austin* v. *United States*, 297 F. 2d 356 (4th Cir. 1961); *Nardone* v. *United States*, 308 U. S. 338 (1939); Fed. Rules of Cr. Proc., Rule 41(e). This Court in zealously protecting the rights of persons to be free from arrests and searches except upon probable cause has not been deterred from enforcing those rights because inevitably litigation is generated over these issues. Similarly, we believe that the argument that additional litigation will result through the enforcement of this right, should be rejected. Indeed, the experience in the State of New York where the standard of evidence before the grand jury is quantitatively and qualitatively higher than the one we are seeking in this case, shows that the danger of a flood of unmanageable litigation is illusory. We refer briefly

to the procedure in that state merely to show that practical rules may be developed in this area which would protect the rights of the defendant without being burdensome.

By interpretation of the New York Constitution, *People v. Glen*, 173 N. Y. 395, 400 (1903), which has substantially the same language as the federal constitution[11] and by statute, N. Y. Code Crim. Proc. § 249, a Grand Jury may receive none but legal evidence, and an accused may compel that standard by moving to dismiss an indictment, *People* v. *Nitzberg*, 289 N. Y. 523 (1943); *People* v. *Sweeney*, 213 N. Y. 37 (1914).[12] When a claim of insufficiency of evidence before the Grand Jury is made, the Court first determines whether or not the defendant has supplied extrinsic proof that there is "evidentiary insufficiency." *People* v. *Howell*, 3 A. D. 2d 153, 158 N.Y.S. 2d 985, 987 (1st Dept. 1957), aff'd 3 N. Y. 2d 672 (1958). If there is no extrinsic proof, the inquiry terminates, *People* v. *Pryor*, 11 N.Y.S. 2d 393, aff'd 283 N. Y. 623 (1940), and this, in and of itself, will have a natural tendency to limit litigation. If, however, there is extrinsic proof of evidentiary insufficiency, then the Court inspects the Grand Jury minutes in camera and dismisses the indictment on its own motion if the evidentiary standard has not been met, *People* v. *Hirschberg*, 37 N.Y.S. 2d 861 (1942); *People* v. *Valerino*, 54 N.Y.S. 2d 521 (1945), or permits the defendant to inspect the minutes and brief and argue the point in those cases where the in camera inspection of Grand Jury minutes shows that the point is fairly arguable. See *People* v.

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[11] Article 1, section 6 of the New York State Constitution provides that, "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury. . . ."

[12] Statutes in other states require that only legal evidence be admitted before the grand jury. Under certain of the statutes, either because of the language of the statutes or by judicial interpretation, defendants have been refused the right to have indictments quashed on the ground that there is insufficient evidence before the grand jury. The citations to the statutes appear in 1 Wigmore, Evidence (3d ed. 1940) 23 fn. 8.

*Mitchell*, 140 Misc. 869, 251 N.Y.S. 716 (1931); *People* v. *Barnes*, 197 Misc. 477, 98 N.Y.S. 2d 481 (1950); *People* v. *Gentile*, 20 A. D. 2d 412, 247 N.Y.S. 2d 551 (1st Dept. 1964).

A similar standard in the federal courts would insure that persons are indicted only upon reliable evidence without forcing prosecutors to produce their entire case before the grand jury. Courts would review the grand jury evidence only when the accused has made a satisfactory showing that the grand jury received relatively large quantities of evidence excludable for want of reliability. This practice would minimize the real possibility of harm to the accused without entailing a significant increase in the workload of the courts, thereby insuring to the accused the enforcement of his Fifth Amendment right without causing prohibitive administrative difficulties.

**b. Historical reasons.**

It has been argued that our grand jury was intended to operate like its English progenitor unhampered by procedural or evidential rules and that grand jurors could even act on their own knowledge. *United States* v. *Costello*, *supra* at page 362. However, even historically, as the Government recognized in its brief to this Court in *Costello* (Gov't. Brief, p. 22), there was a "readily understandable reluctance on the part of at least some judges to send affidavits to a grand jury as a substitute for live witnesses". See *Reg.* v. *Gerrans*, 13 Cox 158 (1876); *Reg.* v. *Bullard*, 12 Cox 353 (1872). In this case, as a substitute for live witnesses, the Government, instead of sending affidavits to the grand jury, sent something less, to wit, a summary of affidavits.

In any event, no matter what rule existed historically, we suggest that in the light of modern day experience some enforceable evidentiary standard is necessary. If there ever was a valid reason for permitting a grand jury to indict based upon its own knowledge that reason surely does not exist today, especially in our large complex urban

societies in which it is only by the most remote coincidence that any member of the grand jury has any independent knowledge of the investigation being conducted. Experience shows that grand jurors alone cannot be relied upon to protect the rights of the accused by requiring the prosecutor to present substantial evidence before an indictment is returned. In modern times grand juries, ever ready to indict based upon evidence such as that presented in this case, are becoming nothing more than investigatory tools of the prosecutor rather than a buffer between the prosecutor and the prospective accused. If the grand jury system is to be abolished as it has been in England since 1933,[15] it should be by Constitutional amendment, not by fiat of the prosecutor.

If the grand jury is to be more than an ancient relic carried over from English Common Law[16], and if there is to be meaning to the Constitutional requirement that a person shall not be held for a crime unless there is an accusation by a grand jury, then some standard of evidence should exist which an accused may compel the Government to follow. Under the present system an accused, who has a constitutional right not to be tried except upon a grand jury indictment, must rely entirely upon the integrity of the prosecutor and the members of the grand jury not to indict upon evidence which does not rationally establish the facts. There is virtually no way for the accused to protect himself from an indictment based upon unreliable evidence and thus the accused has an illusory right because it is not coupled with any remedy. Whatever reasons may have existed historically for permitted grand juries to indict upon their own knowledge surely do not exist today.

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[15] 23 & 24 Geo. 5, C. 36; 5 Halsbury's Statutes of England (2d ed., 1948) pages 1065-1073.

[16] See generally Morse, A. Survey of the Grand Jury System, 10 Ore. L. Rev. 101, 217, 293 (1931).

**c. Grand Jury secrecy.**

It has been said that grand jury minutes should not be re-examined because the secrecy of the grand jury proceedings should remain inviolate. See, *United States* v. *Reed*, 27 Fed. Cas. No. 16,134, p. 727, 738 (C.C.N.D. N. Y. 1852). As a corollary it has been urged that exhibiting the minutes in open court would reveal the prosecution's case to the accused, thus facilitating perjury and subornation. See, *Kastel* v. *United States*, 23 F. 2d 156, 158 (2 Cir. 1927), cert. denied 277 U. S. 604 (1928); Note, 38 Yale Law Journal 680 (1929). However, the purpose of the secrecy requirement is to prevent public circulation of accusations prior to commencement of prosecutions. See, *United States* v. *Perlman*, 247 Fed. 158, 160 (2d Cir. 1917). The courts have never strictly enforced the requirement after the indictment has been returned. This policy is recognized and confirmed in Rule 6(e) of the Federal Rules of Criminal Procedure which provides that there may be disclosure of matters occurring before the grand jury under the following circumstances:

> "when so directed by the Court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment. . . ."

If in an appropriate case there is a need for secrecy to protect a witness or to preserve the integrity of an existing investigation, the relevant facts may be brought to the attention of the court for a determination of that issue. But, secrecy is no reason to sustain an indictment in this case in which the Government itself has revealed the nature of the evidence before the grand jury, and by so revealing has shown that there was no legitimate government reason for keeping the evidence secret after its sufficiency was attacked.

**d. Errors committed by the grand jury may not be purged at the trial.**

Another view reflected by the refusal to examine the grand jury proceedings, is that an indictment is "no more than an accusation" *United States* v. *Remington,* 191 F. 2d 246, 252 (2d Cir.), cert. denied 343 U. S. 907 (1952) and the accused is sufficiently protected because errors committed by the grand jury may be purged at the trial rather than by quashing the indictment. See, *Lawn* v. *United States,* 355 U. S. 339, 350 (1958), cf. *United States* v. *Pappagoda,* 288 Fed. 214 (D.C.D. Conn. 1923).

A somewhat related argument was used in *United States* v. *Remington, supra,* in which the Court refused to permit the defendant to examine the grand jury minutes to attempt to document his charge that the grand jury foreman used undue influence motivated by his financial interest in a book being written by the Government's chief witness in the case. The Court, recognizing that if such influence had been proved the indictment would have been dismissed, said that although "some abuses may thus go uncorrected, it has been the policy of the law, and we think a sound one, to correct only such irregularities as the accused can prove. . . ." 191 F. 2d at 252.

This attitude is inconsistent with the underlying purposes of the Fifth Amendment. The very essence of the Fifth Amendment is that no one should be put to the expense, and hazards of a trial without a regularly arrived at and disinterested prior determination of probable guilt. The grand jury is a safeguard designed to protect the reputation of the accused, to avert the stigma of prosecution unless there is reasonable ground for proceeding. The present practice ignores these ends when it forces the accused to submit to trial even though the indictment was returned substantially upon untrustworthy evidence.

It should be noted that the argument that a fair trial purges the error before the grand jury has been made

in a dissent in *Cassell* v. *Texas*, 339 U. S. 282, 302 (1950), which said: "It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice." But the majority did not agree. Since a grand jury was used to indict, the majority held it to constitutional requirements and we ask this Court to do the same here. See *Beck* v. *Washington, supra*, at 582 (dissenting opinion).

**e. The grand jury determination should not conclusively establish probable cause.**

It has been said, in a somewhat circular analysis, that it is unnecessary to establish probable cause for an arrest if the arrest comes as a result of an indictment "because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant. . . ." *Giordenello* v. *United States*, 357 U. S. 480, 487 (1958). See, *Ex parte United States*, 287 U. S. 241, 249 (1932).[17] However. when one attempts to determine whether or not there was probable cause for the indictment by any standard, he is blocked by the authority of *Costello*. If a grand jury determination conclusively establishes probable cause and that determination is based upon unreliable evidence then the Fifth Amendment right to be indicted by a grand jury is nothing but a procedural formality.

Thus, the reasons which may be advanced for refusing to go behind indictments to cure admitted violations of the Fifth Amendment rights of the accused are overwhelmingly outweighed by the benefits to be derived in continuing the

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[17] But see *Beavers* v. *Henkel, supra*, at 85, in which this Court, because it was not necessary for a holding in that case, refused to regard the indictment as conclusive evidence of probable cause and said that it "is sufficient for this case to decide, as we do, that the indictment is *prima facie* evidence of the existence of probable cause".

proper function of the grand jury—to serve as a buffer between the prosecutor and the public and to insure that indictments are not returned upon the flimsy evidence used in this case. An enforceable standard of evidence will insure against the practical abolition of the grand jury system.

As noted above (p. 12), while not necessary for a holding in this case, we believe that ideally the function of the grand jury should be to determine whether or not a person is susceptible of being convicted, and that the test to determine the sufficiency of the evidence should be whether or not such evidence has been presented to the grand jury so that "if nothing more were heard at trial, a petty jury could conclude that the prosecution had successfully borne the burden of proof." Note, 72 Yale L. J. 590, 592 (1963). This rule, of course, would place a substantially heavier burden upon the grand jury than is necessary for a holding in this case. The reason for adopting such a rule is because if enough of the evidence heard by the grand jury is excludable under all circumstances so that the remaining evidence would not support a conviction, and there is no other evidence available upon which to base a prosecution, an indictment based upon that evidence cannot result in a conviction and such an indictment is not justified as the commencement of the process leading to a conviction because the conviction will never take place. (*Ibid.*) This rule would not prohibit the prosecutor from presenting incompetent evidence to the grand jury since that evidence would be excluded in determining whether or not there is sufficient evidence to establish a *prima facie* case at trial. We have only briefly stated the above proposed rule because it is not necessary for a holding in this case.

When we put in juxtaposition the arguments advanced in favor of a standard of evidence enforceable by the accused, against the evidence presented to the grand jury in

this case, the reasons for quashing the indictment become compelling. If the Court affirms the conviction below, it will be giving prosecutors a formula, which they will undoubtedly use and stretch even further, for obtaining indictments at their whim. That result will be contrary to the purposes of the grand jury requirement. On the other hand, if the indictment in this case is quashed, then prosecutors will know that the grand jury serves a purpose in preventing indictments based upon insubstantial evidence. In conclusion, we urge that a grand jury should have before it at least such evidence as would establish probable cause for an arrest or search. The grand jury in this case did not have such evidence and we ask that the indictment be quashed.

## POINT II

**Written statements of Government witnesses in which they admit prior criminal acts involving moral turpitude should have been made available to the defense under the Jencks Act when the witnesses testified on direct that they "cooperated" with the Government and had been named as defendants in other cases involving the crimes which the witnesses admitted in their statements.**

The Government witnesses at trial were Internal Revenue Service employees who testified about payments they allegedly received from petitioner. After their direct testimony, the witnesses' written statements in the Government's possession were requested by the defense under the Jencks Act, 28 U.S.C. § 3500, which, among other things, requires the Government to produce upon motion of the defendant, "any statement . . . of the witness . . . which relates to the subject matter as to which the witness has testified." However, at the Government's request, on the theory that they were not related to the direct testimony, the District Court refused to make certain of the state-

ments available.[18] The Court of Appeals, affirming the decision of the District Court, found that the statements "relate to payments received by the government witnesses from persons other than appellant, and the material not furnished to appellant in no way related to him"[19] (R. 146).

We believe that it was prejudicial error for the Court below to refuse to permit petitioner to inspect and utilize the statements because a) the statements withheld from petitioner related to the credibility of the witnesses and therefore related to their direct testimony within the meaning of the Jencks Act, and b) the direct testimony of the witnesses related to payments received by them from per-

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[18] Affidavits and statements of the following witnesses were marked as Government exhibits for identification and sealed by the District Court at the request of Government counsel:

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| Clyne | Exs. 102, 103 and 104. (Ex. 101, which was furnished to defense counsel, contains excerpts from Ex. 102) (R. 37-38a). |
| Ellington | Exs. 109, 110 and 112 (Ex. 108, which was furnished to defense counsel, contains excerpts from Ex. 109) (R. 48a). |
| Deitsch | Exs. 115, 116 and 118 (Ex. 114, which was furnished to defense counsel, contains excerpts from Ex. 115) (R. 58-59a). |
| Ryan | Exs. 127, 129 and 131 (Ex. 126 which was furnished to defense counsel contains excerpts from Ex. 127) (R. 72-73a). |
| Lupesco | Exs. 135, 136 and 138 (Ex. 134, which was furnished to defense counsel, contains excerpts from Ex. 135) (R. 84-85a). |
| Levine | Exs. 141, 144 and 147 (Ex. 143, which was furnished to defense counsel, contains excerpts from Ex. 144) (R. 96-97a). |
| Montello | Exs. 150, 152 and 153 (Ex. 149, which was furnished to defense counsel, contains excerpts from Ex. 150) (R. 103a). |

[19] We urge this Court to review, as did the Court of Appeals, the statements withheld by the trial judge. *Rosenberg* v. *United States*, 360 U. S. 367, 369 (1959).

sons other than petitioner and their statements, admitting receipt of money from persons other than petitioner, were related to their direct testimony.

**a. The statements relate to the credibility of the witnesses and therefore should have been turned over to the defense.**

Statements which relate to the credibility of a witness relate to the subject matter of his testimony and should be submitted to the defense for use on cross examination. Thus, in *Rosenberg* v. *United States*, 360 U. S. 367 (1959), this Court said that a statement by a witness that she feared her memory was poor as to the events at issue should have been turned over to the defense. In *Ogden* v. *United States*, 303 F. 2d 724, 739 (9th Cir. 1962), the Court said that a statement concerning the clarity of a witness' recollection of the events to which he testified is within the Jencks Act. In *United States* v. *Borelli*, 336 F. 2d 376, 393 (2d Cir. 1964), cert. denied sub. nom. *Mogavero* v. *United States*, 379 U. S. 960 (1965), the Court said that a statement that would support impeachment for bias and interest relates to a witness' direct testimony. In *Borelli* the Court said:

> "We can see no reason why a statement that would support impeachment for bias and interest does not 'relate' to the witness' testimony as much as a statement permitting impeachment for faulty memory, Rosenberg v. United States, 360 U. S. 367, 370, 79 S. Ct. 1231, 3 L. Ed. 2d 1304 (1959). If 'relate' were to be limited to factual narratives, we should have to consider whether a letter merely proffering a witness' services in return for consideration was within the protection which the Jencks Act confers upon the Government; but we think the broader construction preferable and, indeed, necessary." 336 F. 2d at 393.

It has always been recognized that criminal acts involving moral turpitude are revelant to the issue of a witness'

credibility. *United States* v. *Whiting*, 311 F. 2d 191, 196 (4th Cir. 1962), cert. denied 372 U. S. 935 (1963); *Simon* v. *United States*, 123 F. 2d 80, 86 (4th Cir.), cert. denied 314 U. S. 694 (1941); *Montgomery* v. *United States*, 203 F. 2d 887 (5th Cir. 1953). See 3 *Wigmore, Evidence*, § 977 *et seq.* (3d ed. 1940).

In *United States* v. *Masino*, 275 F. 2d 129, 133 (2d Cir. 1960), the Court said:

> "Where the principal witnesses appearing in behalf of the prosecution have a criminal record or have engaged in illegal practices and are accomplices to the crime charged, it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit."

In this case the witnesses, all of whom were Internal Revenue Service employees, admitted, in statements which were unavailable to the defense, that they took bribes from various accountants. These are clearly admissions which relate to the witnesses' credibility and therefore should have been turned over to the defense. Cf. The Jencks Legislation: Problems in Prospect, 67 Yale Law Journal 674, 693-95 (1958).

The Court of Appeals said that the statements were properly withheld because the Government witnesses admitted other bribes on cross examination and questions "calling for details of other instances of bribery, for which the witnesses had been indicted, might properly have been excluded at trial . . ." (R. 146-47). However, whether or not the details of other instances of bribery might have been excluded at trial is not the issue. As explained more fully in (c) below, the statements would have been helpful on cross-examination not only because they reveal other briberies but also because, inconsistently with the testimony of the witnesses, we believe that they record precisely the time, place, amount and payer of the other bribes.

When the witnesses testified, they had a much poorer recollection than we believe is reflected in their statements to the Government sealed by the Court.

We fully recognize that the extent of cross-examination on these matters is within the discretion of the Court. *Foster v. United States*, 282 F. 2d 222, 224 (10th Cir. 1960). We urge, however, that the Court's discretion is irrelevant to this argument. The Court permitted the witnesses to be questioned about the subject matter of other bribes thereby exercising its discretion, to the extent it had discretion, in favor of permitting the inquiry. The point is that the availability of the statements would have aided the defense in this line of inquiry which had been permitted by the Court and without the statements this line of inquiry was not as effective.

We believe that the statements are within the Jencks Act, because they relate to the credibility of the witnesses, and it was prejudicial error to refuse to turn them over to the petitioner.

**b. The statements withheld from petitioner relate to that part of the direct testimony of the witnesses about other indictments and cooperation with the Government.**

The witnesses Clyne, Deitch and Ryan were asked on direct examination whether or not they had been named as defendants in indictments other than the one before the Court (R. 31a, 51a, 63a). Each of the witnesses admitted that they had been so named (*Ibid.*). The Court may take judicial notice of those indictments, *Freshman* v. *Atkins*, 269 U. S. 121, 124 (1925); *Kaliman* v. *Liberty Mutual Fire Ins. Co.*, 300 F. 2d 547 (2d Cir. 1962),[20] which involve pay-

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[20] The other indictments filed in the District Court against the Government witnesses are as follows:

Clyne, 64 Cr. 688, 689, 690, 692, 1037, 1068, 1069, 65 Cr. 243, 387.

*(Footnote continued on following page)*

ments received by the witnesses from persons other than petitioner—precisely the subject matter of the statements in issue. The statements made by the witnesses, withheld from petitioner, are obviously admissions of guilt to the charges made in the indictments, and since the witnesses were asked questions about that subject matter on direct examination, the statements relate to the direct testimony and should have been turned over to the defense.

Moreover, the statements withheld from petitioner admitting the receipt of money from persons other than petitioner were given as part of a plan of cooperation by each of the witnesses with the Government and the witnesses were told that their cooperation would be made known to the sentencing judge (R. 31-32a, 41a, 51a, 64a, 79a, 98a). The fact that the witnesses had cooperated fully with the Government was elicited on direct examination and the sealed statements relate to that cooperation.

Thus, the witnesses Clyne, Ellington, Deitch, Ryan, Lupesco and Montello each were asked on direct examination whether or not any promises had been made to them for their cooperation with the Government and they each said that they were told that their cooperation would be made known to the sentencing judge (*Ibid.*). Clyne said on direct that "I have been told that if I cooperate that it would be made known to the sentencing judge" and that to cooperate meant to tell the whole truth (R. 32a). Ellington said on direct that "I was told that I would cooperate by telling everything I knew honestly" (R. 41a). Deitch said on direct that cooperation meant "to tell the truth"

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*(Footnote continued from preceding page)*

Deitch, 64 Cr. 688, 689, 691, 692, 1037, 1068, 1069, 65 Cr. 387.
Ellington, 64 Cr. 689, 692, 1037.
Lupesco, 64 Cr. 684, 689, 691, 692, 1037, 1038, 1065, 1068, 1069.
Montello, 64 Cr. 688, 689, 690, 691, 692, 1037, 1066, 65 Cr. 243, 387.
Ryan, 64 Cr. 687, 688, 691, 692, 1066, 65 Cr. 53, 387.

and answered affirmatively when asked if that meant "the whole truth" (R. 51a). The sealed statements evidencing the witnesses cooperation, elicited on direct examination, were erroneously withheld from the defense because they related to the direct examination.

This Court has not defined the scope of the phrase "relates to the subject matter as to which the witness has testified" as used in the Jencks Act except to say in *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959), that a statement relating to the credibility of a witness relates to the direct testimony and is within the Act even though the statement does not otherwise touch on the events testified to on direct.

The Senate Report on the bill that became the Jencks Act states:

> "The proposed legislation, as here presented, reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified to at the trial . . . S. Rep. No. 981, 85th Cong. 1st Sess."

The Ninth Circuit in *Ogden* v. *United States*, 303 F. 2d 724, 740 (9th Cir. 1962), in a case in which portions of a statement "were relevant to the subject matter of the cross-examination only in the broadest terms", said:

> ". . . the test to be applied is not whether the material would be 'relevant' in the evidentiary sense, but only whether it relates generally to the events and activities testified to. The problem is not whether a question framed precisely in the terms of the withheld information would relate to the subject matter of the direct examination, but rather whether the withheld material might be useful in framing ques-

tions which would be relevant to that subject matter. The appropriate analogy is found in Rule 16 of the Federal Rules of Criminal Procedure, and the proper inquiry is whether the omitted portions of the statement 'may be material to the preparation' of proper cross-examination. Doubts are to be resolved in favor of disclosure, for the Court necessarily proceeds without the benefit of counsel's more intimate knowledge of the possible significance of particular information for purposes of impeachment."

In *United States* v. *Cardillo*, 316 F. 2d 606, 615 (2d Cir.), cert. denied 375 U. S. 822 (1963), the Court said "the statement must relate generally to the events and activities testified to."

The withheld statements are within the Jencks Act in the light of its purpose, to make available to the defense prior statements of witnesses which might be helpful in impeaching the testimony of Government witnesses, *Palermo* v. *United States*, 360 U. S. 343, 352 (1959); *United States* v. *Wenzel*, 311 F. 2d 164, 171 (4 Cir. 1962); *United States* v. *Johnson*, 337 F. 2d 180, 202 (4 Cir. 1965), cert. denied sub nom. *Edlin* v. *United States*, 385 U. S. 846 (1966). The Government, had it so elected, could have refrained from asking any questions on direct about the witnesses' cooperation and about the other indictments in which the witnesses were named as defendants. Having elected to elicit this testimony on direct examination, the statements which were in part the "product" of that cooperation, were related to the direct testimony and should have been turned over to the defense.

c. Petitioner was prejudiced by the order refusing him inspection of the witnesses' statements.

The Court of Appeals, as stated above, found that petitioner was not prejudiced by the unavailability of the statements for impeachment purposes because (1) during

the trial petitioner cross-examined the Government witnesses as to their dealings with other persons and "in each instance" the witness admitted accepting money from other taxpayers' representatives, and (2) in any event the details of other instances of bribes for which the witnesses had been indicted might properly have been excluded at trial (R. 146-47). We urge that petitioner was prejudiced by the unavailability of these statements for the following reasons: (1) The Court of Appeals is factually wrong in its statement that "in each instance" the witnesses admitted accepting money from taxpayers' representatives. The fact is that two of the witnesses (Ellington and Levine) were asked no questions on cross-examination about payments received from others and, armed with their prior admissions, their credibility could have been impeached. (2) While much of the testimony of the remaining witnesses was vague with regard to payments received by others, we believe that the statements of the witnesses were precise about the name of the person who paid the money, the date the money was paid and the amount of money involved. This would permit the inference, had the statements been available, that the witnesses were overzealous and factually inaccurate in their cooperation with the Government purporting to give precise facts about other bribes which facts, their testimony shows, the witnesses did not actually remember.

We will discuss the cross-examination of each of the witnesses about payments received from persons other than petitioner to show that there was prejudice resulting from the failure to obtain the statements because the credibility of each of the witnesses could have been attacked much more effectively with the statements.

*Thomas W. Ellington and Seymore Levine*

Ellington and Levine were asked no questions on cross-examination about payments they received from other

accountants. Statements of Ellington (Govt. Exs. 109,[n] 110 and 112 for *id.* R. 48a) and Levine (Govt. Exs. 141, 144[m] and 147 for *id.* R. 96a) were sealed by the District Court upon the Government's representation that they did not relate to the direct testimony of the witnesses. Obviously, armed with those statements, petitioner could have effectively attacked the credibility of the witnesses by cross-examining them about other crimes about which no testimony was elicited on cross-examination. The failure to make those statements available resulted in prejudicial error justifying reversal even if it was not prejudicial error to turn over the remaining statements. *Clancy* v. *United States*, 365 U. S. 312, 316 (1961).

The remaining witnesses who testified that they received money from petitioner were asked on cross-examination about payments they received from persons other than petitioner. A summary of their testimony on this subject follows, at the conclusion of which we shall show how the statements withheld from petitioner could have been effectively used on cross-examination and why petitioner was prejudiced by not having these statements available to him.

*Jeremiah Clyne*

Clyne testified on cross-examination that during his four years and nine months in the Internal Revenue Service, he took money from "somewhere in the neighborhood of about fifteen" taxpayers' representatives on approximately sixty separate occasions (T. 88).[o] He was not

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[n] Portion of Govt. Ex. 109 *id.*, separately marked as Govt. Ex. 108 *id.*, were furnished to the defense (R. 48a).

[m] Portions of Govt. Ex. 144 *id.*, separately marked as Govt. Ex. 143 *id.*, were furnished to the defense (R. 96a).

[o] References with the prefix "T" are to the stenographic transcript of the trial which by stipulation between the parties may be referred to here.

certain of the exact number of taxpayers' representatives from whom he took money (Ibid.). The largest amount that he ever took from a taxpayers' representative was $500 and the smallest amount was "$10, I believe" (Ibid.).

The first time he took money was early in 1960 and he took money in 1962 and 1963 (T. 88-89). He kept no record of money he received from various accountants and did not "know off-hand" approximately how much he received in 1960, although the amount was approximately $600 (T. 90). In 1961 he took approximately $600 (T. 91). In 1962 he took approximately $300, although "it could have been more or it could have been less" (Ibid.). Aside from cash, he received liquor, gift certificates, theatre tickets, baseball tickets and a sweater from taxpayers' representatives (T. 93-94). He did not report these gifts to the Government (T. 95).

*Louis R. Deitsch*

Deitsch first testified that he did not know exactly on how many separate occasions he took money from accountants. When asked to give an estimate, he said it was about thirty or forty times. Immediately after that he also said "I have no recollection of how many times" (R. 62a). His best recollection was that he usually took from between $25 and $50 from taxpayers' representatives (T. 187). He initially said that he had no recollection as to the first time that he took money from accountants and then said it might have been in 1960 (T. 187). He said he could not "tell you how many exact times," before January of 1961, he received money from taxpayers' representatives, except to say that he did receive money "on some occasions" (T. 189). Deitsch could not say how much he received from taxpayers' representatives in 1960—"I have no way of knowing" (T. 190). He said that it was probably more than $100, and when asked if it was more than $200, repeated "I can't tell you exactly how much I received" (T. 190). He could not remember

how much he received from taxpayers' representatives in 1961, except that he did not think it was more than $500 (T. 190-91). He did not know the year that he received $50 from a certain Mr. Cohen but did remember that a Mr. Meyers paid him $50 in 1961 (T. 191-92). He did not recall on how many occasions he took money from Mr. Meyers in 1961 and, while admitting that he testified against Mr. Meyers in another case, he said that "I don't remember what my testimony was at this time" (T. 192). He did not know how much he received from taxpayers' representatives in 1962 although he did receive money (T. 194). He took money from taxpayers' representatives in 1963 on a few occasions but did not recall the total amount he received in that year (T. 195). Deitsch testified that it is possible that he received liquor from a taxpayers' representative (T. 197). He also testified that he was indicted in other cases and pleaded guilty in each case in which he was indicted (T. 201).

*Jeremiah J. Ryan*

Ryan testified that during the nine years that he was employed by the Internal Revenue Service, he took money from taxpayers' representatives from 1961 or "thereabouts" to 1964 (R. 74a). In 1960 "perhaps" he took money—"I don't know" (Ibid.). In 1959 he took no money (T. 316-17). He also said that he shared money with other agents "on many occasions" (T. 317). The largest amount of money he ever received was $600 of which he gave $200 to his group chief (T. 319). The total amount of money he received from accountants was about $2,000—"but it would have to be an estimate, because I don't know" (T. 323). He could not approximate the amount of money he received in 1960 (T. 323-24). When asked if he received $50 on or about April 8, 1960 from an accountant named Cohen, he said "at that time in my memory, trusting my memory, I thought it was 1960, and it may have been" (T. 324). He testified that he

pleaded guilty to that charge (T. 324). When asked whether or not he received $40 from a Mr. Reinstein on or about November 17, 1960, he said that it was about that time, but he had no way of pinpointing exactly except with reference to something else (T. 325). Aside from the aforesaid, on two occasions Ryan testified that he had no recollection of receiving any more money from any other taxpayers' representatives or any other agents in 1960 (T. 325).

Ryan said that in 1961 he received several hundred dollars from taxpayers' representatives (T. 326). He also testified that he received several hundred dollars in 1963 (T. 327). Ryan also testified that he received three or four bottles of whiskey from accountants in connection with audits that he handled (T. 329). Ryan testified that he had been indicted in other cases (T. 332).

In connection with the Ryan testimony, under the Jencks Act, petitioner was permitted to inspect Exhibit 126 (R. 73a), part of an affidavit prepared by Ryan. The complete affidavit marked Govt. Ex. 127 was sealed and has not been inspected by us (R. 72a). However, it is apparent from Govt. Ex. 126 and the blank spaces it contains where portions were excluded, that Ryan, listing names, dates and amounts in columns, was most precise about the name of each taxpayer's representative, the amount of money he received from each taxpayer's representative, the taxpayer's name and address, the account number and the approximate date that the money was paid. When this is contrasted with Ryan's testimony summarized above, its value for impeachment purposes becomes apparent.

*Jeanne Lupesco*

Lupesco testified that she was with the Government fourteen years but did not remember how many years she received money from accountants, although she believed

that the first year was about 1958 or 1959 (T. 887-88). She said that she had no recollection as to how much money she received from accountants in 1958, 1959, 1960 or 1961 (R. 86-87a). She said she had no idea from how many accountants she took money in 1961, 1962 or 1963 (R. 87a). The total amount of money she took over the years was about $1,400. She based that amount on "the figures in my affidavits to the Inspection Service" (R. 88a). (Presumably, these are the very statements at issue.) She could not recollect whether or not she received money from other agents in the Internal Revenue Service (R. 89a). She received gifts of liquor, theatre tickets, clothing and costume jewelry from taxpayers' representatives (R. 89-91a).

*Lawrence F. Montello*

Montello testified that he received money in a great many cases (R. 105a). During the five years that he was in the audit section of the Internal Revenue Service, he received money from seven or eight accountants, five or six times a year (R. 105-06a). The largest amount he ever received from a taxpayer's representative was about $100 and the smallest amount was $25 (T. 445-46). He received money from one other Internal Revenue Service employee—Mr. Ryan—on or about seven occasions, in the amount of $25 each time (T. 446-47).

We believe that an inspection of the sealed statements will show that they are reasonably precise as to the person who paid the money, the amount paid, the name of the taxpayers involved and the date of payment. The testimony of the witnesses who were asked questions about the receipt of money from accountants other than petitioner was much less precise.

Thus, we believe that on cross-examination the sealed statements could have been effectively used, not only to show each specific crime which the witnesses admitted and

to thereby attack the credibility of each witness, but also to show that the witnesses were precise when they were sitting down with Government agents drafting affidavits about petitioner and other accountants. They also were precise in their direct testimony describing payments received from petitioner. However, they were not nearly as precise when queried on cross-examination about the same matters contained in their affidavits.

Fortified with these affidavits, we believe that effective cross-examination could have been conducted suggesting that the witnesses used the affidavits to memorise the testimony which they gave against petitioner, and that they did not actually remember the events about which they testified. This, we could have suggested, was done in an overzealous effort to cooperate with the Government, in return for leniency.

We respectfully urge that it would be pure speculation to suggest, as the Court of Appeals did in this case, that no effective use could have been made of the witnesses' statements (R. 146-47). The Jencks Act leaves no room to speculate as to how useful statements will be for the purposes of cross-examination or how important the cross-examination will be to a defendant's case. *United States* v. *Ellenbogen*, 341 F. 2d 893 (2d Cir. 1965). In any event, on the authority of *Clancy* v. *United States*, 365 U. S. 312 (1961), since two of the witnesses were asked no questions on cross-examination about other bribes they had taken and since evidence of other bribes that those witnesses took was unavailable to the defense, the harmless error point is not reached. In *Clancy*, this Court said:

> "We put to one side *Rosenberg* v. *United States*, 360 U. S. 367, where a failure to produce a document was considered to be harmless error under the particular circumstances of that case. We do not reach the harmless error point because, if applicable, it is relevant only to the report of one of the agents, not to

those of the other two. Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively." 365 U. S. at 316.

In *Clancy*, this Court quoting from *Jencks* v. *United States*, 353 U. S. 657, 667 (1957) said:

"Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

In *United States* v. *Ellenbogen, supra,* the Court, in reversing a conviction on the ground that testimony related to similar unlawful dealings with other persons was elicited on direct examination and statements relating to those other dealings were withheld from defense counsel, said:

"Given that the statement 'relates to the subject matter as to which the witness testified,' and that defendant insisted upon having the statement produced, the statute leaves no room for the trial judge, nor for us, to speculate as to how useful this statement will be for purposes of cross-examination or how important such cross-examination will be to defendant's case. . . ." 341 F. 2d at 894.

See also, *Dennis* v. *United States*, 384 U. S. 855, 875 (1966).

Once it is determined that the statements are within the Jencks Act any doubt as to the usefulness of the statements for cross-examination must be resolved in favor of

the defendant. It is respectfully urged that the sealed statements related to the direct testimony of the witnesses within the meaning of the Jencks Act, they were improperly withheld and petitioner was prejudiced.

## POINT III

**Title 18 U.S.C. § 201(f) which prohibits a person from giving money to a public official "for the proper discharge of official duty" is inconsistent with Title 18 U.S.C. § 201(b) which prohibits the payment of money "corruptly".**

Petitioner was convicted of violations of Title 18 U.S.C. § 201(f) (counts 10, 11 and 12) and, on the identical facts, for violations of Title 18 U.S.C. § 201(b) (counts 25, 26 and 27). Those counts are mutually exclusive because § 201(f) prohibits the payment of money "otherwise than provided by law for the proper discharge of official duty . . ." and § 201(b) prohibits the payment of money to public officials "corruptly" and with intent "to influence any official act . . ." The evidence on the remaining counts of the indictment, counts 1 through 9 and 16 through 24, respectively, also was the same. Those counts which charge violations of 26 U.S.C. § 7214(a)(2) and 18 U.S.C. § 201, respectively, are inconsistent in the same manner as counts 10 through 12 and 25 through 27, respectively, because the charge of the Court (R. 121-22a, 123-124a) made it virtually impossible to distinguish between alleged violations of 26 U.S.C. § 7214(a)(2) and 18 U.S.C. § 201(f) on the one hand (the latter being referred to as the "gratuity" counts) (R. 121a) and 18 U.S.C. § 201(b) and 18 U.S.C. § 201, on the other hand (referred to as the "bribery" counts) (R. 118a).

The District Court denied petitioners motion to require the government to go to trial on either the "corruption" or the "gratuity" counts (R. 106a). The Court of Ap-

peals vacated the convictions on the three § 201(f) counts on the ground they were "lesser included offenses" than § 201(b) (R. 144). However, as we shall show, this did not cure the error because it would be pure speculation to conjecture which if any theory the jury would have adopted had only one set of counts been submitted to it.

**a. Counts 10 through 12 and Counts 25 through 27, respectively.**

Counts 10, 11 and 12 of the indictment charge that the petitioner gave money otherwise than as provided by law to certain public officials "for the proper discharge of official duties" in violation of Title 18 U.S.C. § 201(f). Counts 25, 26 and 27 charge that the same money was paid to the same public officials "corruptly" and "with the intent to influence official acts, to wit, the office audit examinations of income tax returns . . ." in violation of Title 18 U.S.C. § 201(b).

Title 18 U.S.C. § 201(f) provides a maximum two-year sentence and a $10,000 fine for the following:

> "(f) Whoever, otherwise than as provided by law *for the proper discharge of official duty*, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . ." (emphasis supplied)

Title 18 U.S.C. § 201(b) provides, among other things, a maximum fifteen-year sentence and a $20,000 fine for the following:

> "(b) Whoever, directly or indirectly, *corruptly* gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any

person who has been selected to be a public official to give anything of value to any other person or entity, *with intent*—

(1) *to influence any official act* or . . . ." (emphasis supplied)

Thus, Counts 10 and 25 charge that on June 14, 1963 petitioner gave J. Clyne, an Internal Revenue Service employee, $75 in connection with the audit of the 1961 income tax return of A. & E. Jacs. Counts 11 and 26 charge that on January 28, 1963 petitioner gave L. Montello, an Internal Revenue Service employee, $50 in connection with the audit of the 1961 income tax return of R. & J. Hurley. Counts 12 and 27 charge that on October 2, 1963 petitioner gave J. Ryan, an Internal Revenue Service employee, $50 in connection with the audit of the 1962 income tax return of A. and M. Mountrey (R. 8a-11a).

The only difference between those two series of counts is that Counts 10, 11 and 12 charge that the money was paid by petitioner for the "proper" discharge of duties of certain Government officials and Counts 25, 26 and 27 allege that the money was paid by petitioner "corruptly" and with "intent to influence official acts." The two series of counts are inconsistent with each other for it is impossible to pay money for the "proper" discharge of an official act and, at the same time, to pay the same money with a "corrupt" intent to influence the same official act.

Nevertheless, the jury found petitioner guilty of each of the aforesaid counts.

The charge of the Court was inconsistent in the same manner as the indictment and compounded the error by making it absolutely clear that on the same facts the jury could find petitioner guilty of paying money for the proper and improper audit of the same return. With respect to Counts 10, 11 and 12 the Court charged that the Government must prove beyond a reasonable doubt that the money

was given "for the proper discharge of the official duties . . ." of the Government employee (R. 122a, See R. 120a). With respect to Counts 25, 26 and 27 the Court charged that the Government must prove beyond a reasonable doubt that the money was paid "with a corrupt intent to influence such employee in the performance of his official capacity in a matter then pending before him" (R. 118-19a). The Court also said with respect to Counts 25, 26 and 27:

> "In short, the underlying basis of these crimes is that the defendant must have an evil or corrupt intent to influence the government employee in a matter then pending before him. If it isn't pending before him, he could not logically have any intent to influence; and accordingly, if those facts are the facts you find, then you must acquit." (R. 119a)

It is apparent that if the money was given for the proper discharge of duties it could not have been given with an evil or corrupt intent to influence the Government employee and, as we shall explain below, where a guilty verdict on one count negatives a finding of guilty on another count the two verdicts cannot stand.

**b. Counts 1 through 9 and Counts 16 through 24, respectively.**

The evidence adduced to prove Counts 1 through 9 and Counts 16 through 24, respectively, was the same. Those counts are inconsistent in the same manner as Counts 10 through 12 and 25 through 27, respectively.

While Counts 1 through 9 do not contain the word "proper", the charge on these counts immediately followed the charge on Counts 10, 11 and 12, and, with respect to the question of whether payment was made for the proper discharge of official duties is concerned, the jury could not have distinguished between the elements necessary to prove Counts 1 through 9 and the elements necessary to prove Counts 10, 11 and 12.

From the very outset of the case, Counts 1 through 9 and Counts 10 through 12 were discussed as crimes with the same elements by the prosecutor who said in his opening:

> "Counts 1 through 12 of the indictment, the first 12 counts, refer to these 12 payments and charge in essence the defendant, Umans, with what can be characterized as the passing of a 'gratuity'—that is, the knowing payment of money—to an Internal Revenue Service agent for the performance of his duty, the audit of an income tax return." (R. 27a)

At the conclusion of the case, with respect to Counts 10, 11 and 12, the Court below charged that the Government must prove each of the following elements beyond a reasonable doubt:

> "(1) that the defendant did give a sum of money to the agents named—that is, to Clyne, Montello, and Ryan; (2) that his money was given otherwise than as provided by law for the proper discharge of the official duties of such employee; and (3) that this money was given for and because of official acts performed or to be performed by the said employee, to wit, the official audit examination of the income tax returns therein named." (R. 122a)

The charge with respect to Counts 1 through 9 followed almost immediately and with respect to these counts the Court said:

> "Under these nine charges you, of course, must first determine whether, on or about the dates mentioned, Deitsch, Ellington, Lupesco or Ryan were employees of the Internal Revenue Service; two, whether they were acting on those dates in connection with any Revenue law of the United States; and three, whether each received, on or about the dates mentioned, a fee, compensation or reward except as by law prescribed

for the performance of any duty; and if they did, did the defendant in each particular count aid and abet, induce or procure such receipt." (R. 123a)

At the conclusion of the Government's case the Court denied appellant's motion for an order directing the Government to elect to go to the jury on the twelve "gratuity" counts (1 through 12) or on the twelve "corruption" counts (16 through 27) (R. 106-07a). This we believe was prejudicial error.

If a guilty verdict on one count negatives a fact essential to a finding of guilty on a second count, the two guilty verdicts cannot stand, *Marquez-Anaya* v. *United States*, 319 F. 2d 610 (5th Cir. 1963); *Thomas* v. *United States*, 314 F. 2d 936 (5th Cir.) cert. denied 375 U. S. 849 (1963).

In the *Marquez-Anaya* case, the defendants were charged with smuggling marihuana and also were charged with being transferees of the same marihuana which had been smuggled. Thus, the defendants, in effect, were found guilty of having acquired marihuana in Mexico for the purpose of smuggling it into the United States, and having transferred the same marihuana in the United States. The Court held that the conviction of one of the counts could not be sustained because of the obvious inconsistency. Similarly, in *Thomas* v. *United States, supra*, the defendants were found guilty of acquiring marihuana in Mexico and acquiring the same marihuana in the United States. The Court held that the two guilty verdicts could not stand.

In *United States* v. *Daigle*, 149 F. Supp. 409 (D.C.D.C.), aff'd 248 F. 2d 608 (D. C. Cir. 1957), cert, den. 355 U. S. 913 (1958), the Court said:

"where a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand." 149 F. Supp. at 414.

In *Fulton* v. *United States*, 45 App. D. C. 27 (1916), the indictment charged that certain embezzled property belonged to a man named Smith and, in another count charged that the same property belonged to Smith and other named persons. The defendant was found guilty of both counts and the Court reversing the conviction on each count said:

> "If this money belonged to Smith individually, it could not have belonged to him and the other persons named. And yet the jury has found that it could and did. . . . The indictment charged the embezzlement of a lump sum, and the proposition is too plain to admit of argument that if the jury had found that this sum belonged to Smith, such a finding negatived the possibility of ownership in anyone else. On the other hand, a finding that it belonged to Smith and the other persons named in the third count of the indictment, negatived the averment in the first count that it belonged to Smith alone." 45 App. D. C. at 41.

In *Davis* v. *United States*, 37 App. D. C. 126 (1911), the defendant was found guilty of obtaining property by false pretenses and embezzling the same property. In reversing the judgment of conviction below, the Court said that the verdict under the embezzlement counts negatived one essential fact in the crime of procuring money by false pretenses, namely, the divesting of the title originally.

It should be noted that this error requires that judgment on each of the counts of the indictment be reversed because it would be pure speculation to attempt to determine which, if any, of the counts would have resulted in conviction if the jury had been properly charged. Both in *Fulton* and *Davis, supra*, the judgment as to each of the inconsistent counts was reversed. In *Davis*, the Court said:

> "It is not the province of the court to conjecture which theory the jury would have adopted had their attention been drawn to the matter. That is a question for their determination." 37 App. D. C. at 133-34.

In *Fulton*, the Court said:

> "Moreover, while the sentence imposed does not exceed the maximum penalty possible under a conviction upon either count, it is mere conjecture to say that the court was not influenced by the double conviction. We conclude that the court committed error in permitting the jury to return a verdict of guilty upon both counts." 45 App. D. C. at 42.

This case in this respect is distinguishable from *Thomas* v. *United States, supra,* and *Marquez-Anaya* v. *United States, supra,* because in each of those cases the evidence demonstrated that one of the two inconsistent facts was the only one which the jury could have properly found. In the instant case it is impossible to argue from the evidence that one series of counts rather than the other is the only one permissible from the evidence.

Similarly, *United States* v. *Daigle, supra,* also is distinguishable in this respect because the charge to the jury correctly permitted a guilty verdict on only one of the two inconsistent possibilities but the jury brought in guilty verdicts on both counts. In the instant case, as stated above, the charge of the court was consistent with the statutes and, within the framework of the charge, the jury was permitted to find petitioner guilty of inconsistent counts of the indictment.

The Court permitted the jury to find petitioner guilty of crimes which are mutually inconsistent because one of the elements of Counts 1 through 12 (money paid for the proper discharge of official duties) negatives an element of Counts 16 through 27 (money paid for the improper discharge of official duties). Therefore, we respectfully urge that the conviction on each count of the indictment against petitioner be reversed.

## POINT IV

**Petitioner was improperly convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two people and with respect to which petitioner could not be an aider and abettor.**

Petitioner, in Counts 1 through 9 of the indictment, was convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which, as applied to this case, prohibits Internal Revenue agents from accepting money otherwise than as prescribed by law for the performance of their duties. Under the circumstances of this case in which petitioner is accused of having *paid* the money, petitioner may not be convicted of being an aider and abettor in the *receipt* of the bribe because it is impossible to commit the substantive offense without cooperative action. Petitioner's timely motion to dismiss these counts of the indictment was denied (R. 14a, 23-24a).

There is no decision by this Court on this issue involving violations of 26 U.S.C. §7214(a)(2). The Court of Appeals for the Second Circuit in this case and in *United States* v. *Kenner*, 354 F. 2d 780 (2 Cir. 1965), cert. denied 383 U. S. 958 (1966) has rejected this argument.

Title 26 U.S.C. § 7214(a)(2) provides in pertinent part as follows:

> "(a) Unlawful acts of revenue officers or agents—Any officer or employee of the United States acting in connection with any revenue law of the United States— • • • (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; • • • shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than

$10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution."

The aiding and abetting statute 18 U.S.C. § 2, which is designed to punish aiders and abettors as principals, could not have been intended to cover § 7214(a)(2) where the alleged aider is the payor of the bribe because a man who pays a bribe to a Government official will not be a Government official himself and therefore he cannot be dismissed from office or discharged from employment, which is one of the penalties imposed for violating this statute.

Moreover an aider and abettor should stand in the same relation to the crime as the principal. Another government employee who participates with a principal in the receipt of a bribe might properly be classified as an aider and abettor, but the payer of a bribe is on the opposite side of the transaction and is necessary to consummate the bribe. Thus, it is impossible for the aider and abettor to be the payer of the bribe.

While as stated above there is no decision of this Court involving this statute, there are other decisions involving different statutes requiring the acts of two people which are helpful because they are analogous.

In *Gebardi v. United States*, 287 U. S. 112 (1932), this Court reversed a Mann Act conviction of a man and the woman he was accused of transporting across State lines for purposes of prostitution. This Court, citing numerous authorities, said that "where it is impossible under any circumstances to commit the substantive offense without

cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, . . . . or under the federal statute." *Id.* at 122. The Court also said that it was resting its decision on the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent. *Id.* at 123.

In *United States* v. *Kats*, 271 U. S. 354 (1926), the defendants, the buyer and seller of liquor, were indicted for conspiracy to sell intoxicating liquors. This Court affirmed the quashing of an indictment and said "but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity." *Id.* at 355.

In *United States* v. *Sager*, 49 F. 2d 725 (2d Cir. 1931), the Court of Appeals for the Second Circuit said that "where concert is necessary to an offense, conspiracy does not lie." *Id.* at 727, and on that ground dismissed that count of an indictment alleging concert between several intended givers of a bribe and the intended taker of the same bribe.

See also *United States* v. *Dietrich*, 126 F. 664 (C.C.D. Neb. 1904), in which the charge was that one of the defendants agreed to give and one of the defendants agreed to receive a bribe in violation of the federal bribery statute, and *United States* v. *New York Cent. & H.R.R. Co.*, 146 F. 298 (C.C.S.D.N.Y. 1906), affirmed 212 U. S. 481 (1909), in which the charge was that one of the defendants should give and the other receive an unlawful rebate in violation of the Interstate Commerce Act. In those cases the conspiracy counts were dismissed.

The fact that the aforesaid cases were conspiracy cases and the instant case is an aiding and abetting case is a

distinction without a difference for if the charge of conspiracy will not lie because the crime itself requires concert of action then the aiding and abetting charge will not lie for the same reason. Cf. *Gebardi* v. *United States, supra,* at 119; *Nye and Nissen* v. *United States,* 336 U. S. 613 (1949).

This Court in *Gebardi* v. *United States, supra,* and *United States* v. *Katz, supra,* examined the intent of the Legislature in determining that a Mann Act conviction of a man and the woman he was accused of transporting across state lines for the purposes of prostitution could not stand, and in determining that a conspiracy to sell intoxicating liquors would not lie if the only persons accused are the buyer and the seller. In the instant case, an examination of the intent of the Legislature, as shown by the language of the statute itself, leads to the same conclusion. Title 26 U.S.C. § 7214(a)(2) provides, among other things, as a penalty, that the offender shall be dismissed from office or discharged from employment. Petitioner not being a public official could not be dismissed from office or discharged from employment.

Moreover, it would have been a simple matter for Congress, before 1963, to enact a statute having the same elements of § 7214(a)(2) encompassing the payer of money without intent to influence official acts rather than just the recipient. This was done in 1963 with the amendment to Title 18 U.S.C. § 201 which now is 201(f). To permit the Government through the use of 18 U.S.C. § 2 to bring in the alleged payer of money as an aider and abettor is inconsistent with the intent of the Legislature and with those cases which hold that a conspiracy count will not lie, where the crime necessarily requires the acts of two people and those very two people are the accused.

*May* v. *United States,* 175 F. 2d 994 (D. C. Cir.), cert. denied 338 U. S. 830 (1949), relied upon by the Court of Appeals in affirming *United States* v. *Kenner, supra,*

and other cases similar to it are distinguishable. See, for example, *United States* v. *Holte*, 236 U. S. 140 (1915); *Ex parte O'Leary*, 53 F. 2d 956 (7th Cir.), cert. denied 283 U. S. 830 (1931); *Vannata* v. *United States*, 289 F. 424 (2d Cir. 1923). Thus, for example, *May* v. *United States, supra*, and *Ex parte O'Leary, supra*, involve more than merely the givers and the receivers of the bribe. They involve conspiracies among other persons. Similarly, *Vannata* v. *United States, supra*, involves more than the purchaser and seller of whiskey. It is certainly consistent with the theory we are urging to have the receiver of the bribe conspire with more than one person to receive a bribe. In *United States* v. *Holte, supra*, the Court found that the substantive offense might be committed by one person alone making that case distinguishable.

We believe that the Congressional intent of this particular statute as manifested by its language in penalizing persons by requiring them to forfeit their jobs, and the fact that Congress did not see fit until 1963 to pass a statute penalizing a giver of a bribe under these circumstances, leads to the conclusion that it was improper to indict the petitioner for aiding and abetting a violation of Title 26 U.S.C. § 7214(a)(2).

## CONCLUSION

**For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the indictment should be quashed.**

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New York, N. Y. 10021.
Counsel for Petitioner.

August, 1967.

# APPENDIX

Title 18 U.S.C. § 201 (as effective until January 20, 1963) provides:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof; with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

Title 18 U.S.C. § 201 (which became effective January 21, 1963) provides in pertinent part:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has ben selected to be a public official to do or omit to do any act in violation of his lawful duty,

* * * * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

* * * * *

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;

* * * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Title 26 U.S.C. § 7214 provides in pertinent part:

(a) Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * * *

Shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

Title 18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 U.S.C. § 3500 provides in pertinent part:

* * * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains

matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant and the defendant objects to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 41

SAM UMANS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (R. 138-147) is reported at 368 F.2d 725.

### JURISDICTION

The judgment of the court of appeals was entered on October 27, 1966. A petition for rehearing was denied on November 15, 1966. Mr. Justice Harlan extended the time for filing a petition for a writ of

certiorari to January 14, 1967. The petition was filed on January 12, 1967, and the writ was granted on February 27, 1967 (R. 159; 386 U.S. 940).

## QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed on the ground that it had been returned on the basis of hearsay evidence.

2. Whether the trial court properly exercised its discretion in withholding from petitioner statements by government witnesses admitting the receipt of bribes from persons other than petitioner.

3. Whether petitioner's convictions under 18 U.S.C. 201(b) and (f) involve mutually inconsistent crimes and must therefore be reversed.

4. Whether petitioner was properly convicted of aiding and abetting Internal Revenue agents in receiving fees prohibited by 26 U.S.C. 7214 (a)(2).

## STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part:

* * * *

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of

the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. * * *

The other relevant statutes are set forth in the Appendix, *infra*, pp. 37-38.

## STATEMENT

1. Petitioner, a certified public accountant, and six Internal Revenue Service employees were indicted in August 1964, in the Southern District of New York, on charges arising out of the giving and receiv-

ing of sums of money in connection with the examination of income tax returns (R. 17). On March 25, 1965, petitioner and the same six employees were reindicted in a twenty-seven count superseding indictment. Counts 1 through 9, embracing nine separate transactions prior to January 20, 1963, charged four of the participating government employees with receiving illegal fees, and petitioner with aiding and abetting them, in violation of 26 U.S.C. 7214(a)(2). In counts 16 through 24, involving these same transactions, petitioner was additionally charged with giving money to the employees in order to influence their official acts, in violation of former 18 U.S.C. (1958 ed.) 201 (in effect through January 20, 1963). Counts 10 through 12 (embracing transactions subsequent to January 20, 1963), charged that petitioner paid money to three employees, Jeremiah Clyne, Lawrence Montello and Jeremiah Ryan "for or because of official acts", in violation of 18 U.S.C. 201(f). In counts 25 through 27, covering these same transactions, petitioner was charged with paying money to these three employees "with intent to influence official acts", in violation of 18 U.S.C. 201(b). In counts 13 through 15, the three employees were charged with receipt of this money from petitioner because of official acts performed by them, in violation of 18 U.S.C. 201(g) (R. 6-11). The six Internal Revenue Service employees pleaded guilty (R. 1-3). Petitioner was found guilty as charged by a jury and was sentenced to imprisonment for two years on each count under

which he was charged, the terms to run concurrently (R. 24-25).

2. The sufficiency of the evidence is not challenged here. In brief, it showed that petitioner appeared before the audit section of the Internal Revenue Service on behalf of taxpayers to justify deductions taken on their income tax returns for travel and entertainment expenses and contributions. The deductions claimed in the tax returns ranged from $1750 to $5200 (See, *e.g.*, R. 36-37; 83; Ex. 8). In some instances, the office auditor was told that petitioner was a friend of the group supervisor (R. 32-33), or that he should give the return "favorable tax treatment" (R. 100). In other instances, petitioner promised to pay the auditor if he would confine the scope of his disallowances (R. 66, 82). Petitioner and the office auditor would then agree that a part of the deductions could be disallowed in amounts ranging from $400 to $1200 (See, *e.g.*, R. 70, 67; Ex. 8). Some of the auditors thereafter prepared audit reports reciting that they had seen documentary evidence supporting a substantial part of the deductions claimed, although in fact they had been given no such evidence (see, *e.g.*, R. 57, 82-83; Ex. 8). Some were shown substantiation for part of the amount claimed (See, *e.g.*, R. 36). The six auditors and the one supervisor involved were paid by petitioner in amounts ranging from $25 to $75 with respect to each audit (See, *e.g.*, R. 46, 84, 95). One of the auditors accepted money from petitioner on five occasions (R. 58-59), another

was paid twice (R. 68-71) and the other four received money on a single occasion.

3. At the trial, the six auditors (named as co-defendants with petitioner) and the supervisor (named as as a defendant in another case) were the principal witnesses against petitioner. At the conclusion of the direct examination of the first auditor, petitioner asked for the "Section 3500 material". The government turned over a statement (Ex. 101) of the witness covering his transaction with petitioner, and testimony given by the witness before a previous grand jury (Ex. 105). The testimony (as distinguished from the statement) dealt exclusively with transactions involving accountants other than petitioner (R. 37-39). The government refused to turn over additional statements of the witness (Exs. 102, 103, 104) on the ground that they did not relate to the direct testimony. Petitioner's counsel then stated (R. 38):

> May I note for the record, your Honor, my position with respect to any portions of any statement which the government desires not to produce for my examination? I respectfully submit that every statement made by this witness should be turned over to defense counsel for use in cross-examination.

The court, after examination of the withheld statements, agreed with the government (Tr. 79).

The same procedure was followed in connection with the other witnesses (R. 47-49, 58-59, 72-73, 84-85, 96-97, 103-104; Tr. 232-233), all of whom had testified before a previous grand jury. With one ex-

ception, the grand jury testimony and the grand jury exhibits (Exs. 106, 113, 119, 119A, 132, 139, 146, 148, 154) which were turned over dealt with transactions with other accountants. A single witness did mention the receipt of money from petitioner in connection with income tax matters (Ex. 148).[1]

All of those prior statements by the witnesses which were not made available to petitioner were ordered sealed (R. 4) and have been forwarded to this Court. The court of appeals stated that the withheld statements "relate to payments received by the government witnesses from persons other than appellant, and the material not furnished to appellant in no way related to him" (R. 146). Some of the statements which were turned over to petitioner (Exs. 107, 128, 137), however, did mention transactions with other accountants. Petitioner, in his cross-examination, asked five of the witnesses about payments they had received from other accountants (Tr. 88-94, 185-195, 316-327, 386-392, 444-448). He also questioned two of these witnesses about their trial testimony in three other bribery cases (R. 86; Tr. 191-192, 450-451).[2]

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[1] The trial witnesses who testified before a previous grand jury did so in the early stages of investigation, between January and March 1964. Their affidavits were prepared after their grand jury testimony and, as indicated in the text, were summarized in the proceedings before the second grand jury.

[2] Petitioner himself did not testify and presented no witnesses.

4. During the trial, petitioner elicited from the auditor-witnesses who testified for the government the fact that they had not testified before the grand jury which indicted six of the witnesses and petitioner in March 1965. At the conclusion of the case, petitioner moved to dismiss the indictment and requested the court to examine the grand jury minutes to determine whether there was sufficient evidence before the grand jury "even under the case of U.S. v. Costello." The court denied his motion and request (R. 106). In its brief in the court of appeals, the government stated that, before the grand jury, it had called as its witness an agent of the Internal Revenue Service and that he had testified that the named auditors (who testified at trial) executed affidavits in connection with an investigation relating to Mr. Umans. The agent, the government advised, had summarized the portions of the affidavits relating to the illegal payments made by Umans.

The court of appeals overruled petitioner's contention that the trial judge had abused his discretion in denying petitioner's request to inspect the minutes of the grand jury in order to determine whether there was testimony to support the indictment.

## SUMMARY OF ARGUMENT

### I

An indictment, valid on its face, returned by a properly constituted grand jury is not subject to attack on the ground that it rests on insufficient evi-

dence. *Costello* v. *United States*, 350 U.S. 359; *Lawn* v. *United States*, 355 U.S. 339. The Constitution made the grand jury, not the trial court, the guardian against the institution of arbitrary criminal charges, placing its trust in the individual consciences of the veniremen rather than in rules of procedure or evidence. There is thus no reason for an intermediate preliminary trial to determine whether there should be a trial before a petit jury.

In addition, the testimony of an internal revenue agent—who summarized for the grand jury affidavits made by persons either indicted with petitioner or already under indictment—was more than sufficient to establish probable cause. Since these affiants were subject to prosecution, there is no doubt that the grand jury could credit their verified statements against interest without calling them as witnesses.

The prosecutor's action in relying on this testimony does not support an inference of bad faith. There are strong policy considerations against calling *de facto* defendants as grand jury witnesses. It also appears that there were statements of the witnesses, which the prosecutor knew would be available to the defense under 18 U.S.C. 3500.

II

The district court properly refused to turn over to the defense statements by the witnesses admitting the receipt of bribes from persons other than petitioner and having no relationship to him. The Jencks statute compels the production of statements which

may be useful in the conduct of permissible cross-examination while at the same time affording protection against needless exposure of confidential information. It, therefore, does not require the production of irrelevant material, especially information about the activities of persons not on trial. Here, the trial court had discretion whether to allow any effort at impeachment of the witnesses on the basis of other similar acts of misconduct. It likewise had discretion to refrain from ordering the production of statements dealing with matters which it would not, and need not, permit counsel to pursue on cross-examination, particularly since counsel had ample independent basis for proper cross-examination. Petitioner's present theories as to the relevance of the withheld material were not advanced to the trial court and are not supported by the record.

III

Petitioner was not convicted of mutually inconsistent crimes since there is no repugnancy in the statutes forbidding payments to federal employees under which he was charged. Both the history and language of these statutes demonstrate that Congress proscribed all unauthorized payments to federal employees, and that it distinguished between the greater and lesser offenses which it created by requiring additional rather than contradictory elements of proof.

IV

The conviction of aiding and abetting the receipt of illegal fees by internal revenue agents was proper

This is made clear by the 1951 amendment to the aider and abettor statute, wherein Congress expressly declared its intent to punish persons incapable of committing the specific violation which they were charged with aiding and abetting.

## ARGUMENT

### I

### The District Court Properly Refused to Dismiss the Indictment in Response to the Claim That the Grand Jury Heard Insufficient Evidence.

The grand jury indicted petitioner and six revenue employees in a single indictment charging the giving and receiving of bribes. This indictment superseded an indictment returned earlier against petitioner and his six co-defendants and was one of a series of indictments involving numerous defendants returned in the course of grand jury investigations into a widespread pattern of corruption within the New York City offices of the Internal Revenue Service. The grand jury, as a basis for its action, heard an internal revenue agent who summarized affidavits of the six co-defendants and the affidavit of a seventh revenue employee, Seymore Levine, separately indicted (R. 145). The affidavits, turned over during the trial, implicated the affiants and petitioner in the receipt and payment of particular sums of money during the audit or examination of specific tax returns. The grand jury did not ask to see the affidavits, and it did not summon the co-defendants (the principal witnesses at the trial) to verify their sworn statements. Petitioner's claim is that the indictment was

invalid and his conviction void because the grand jury heard insufficient evidence upon which to return an indictment. He argues that the trial court had a duty to examine the minutes of the grand jury to review the testimony upon which it acted. We urge, on the contrary, that it is not the function of the trial court to review the sufficiency of the evidence before the grand jury and that the evidence was in all events sufficient to establish probable cause for the trial of petitioner before a petit jury.

### A. *An Indictment, Valid on Its Face, Returned by a Properly Constituted Grand Jury Is Not Subject to Attack on the Ground That It Rests on Insufficient Evidence.*

In *Costello* v. *United States*, 350 U.S. 359, this Court unanimously held that a defendant has no right to go behind an indictment, valid on its face, returned by a legally constituted and unbiased grand jury, in order to determine the sufficiency of the evidence upon which it acted. In so ruling, it reviewed the history of grand jury proceedings and adhered to its earlier decision in *Holt* v. *United States*, 218 U.S. 245. More recently, this ruling was reaffirmed in *Lawn* v. *United States*, 355 U.S. 339. See also *United States* v. *Blue*, 384 U.S. 251. We submit that there is no sound reason to depart from the settled rule and to place upon the trial court the duty of weighing the evidence before the grand jury and appraising its determination of probable cause.

The Constitution entrusted the grand jury with the function of initiating serious criminal charges. It

alone was given the power to decide whether a particular person should be required to stand trial before a petit jury. The Founders' conviction was that a body of laymen chosen for a limited term could perform this function more wisely and fairly than a regularly appointed official. As this Court said in *Wood* v. *Georgia*, 370 U.S. 375, 390, "[h]istorically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution."

The grand jury is thus the chosen instrument that the Constitution provides to guard against arbitrary indictment. Petitioner is in the position of arguing that the courts should protect him from the possibly mistaken actions of the very agency which has been selected to provide a buffer against arbitrary prosecution.

The safeguard which inheres in the institution of the grand jury does not lie in formalized requirements as to the kind or quantum of evidence. This is obvious since the scheme has no place for cross-examination or other means of testing the evidence through an adversary process. The protection which it affords is, in essence, the conscience of each member of the grand jury. Certainly, a grand jury is not infallible. No one has ever supposed that it would be. The supposition, however, was that additional protections were to be provided only through the medium of the trial. An indictment, while a serious step in a criminal proceeding, is but a preliminary step to a trial before a petit jury.

Moreover, the probability that a prosecutor, who must try the case, will urge a grand jury to return an indictment which he cannot reasonably expect to prove, and that twelve men, drawn from the community at large, will vote for an indictment which has no reasonable basis in fact is remote. Nothing in federal experience suggests a need to place between the grand jury and the trial to a petit jury an intervening process of review. What this Court said in the *Costello* case, 350 U.S. at 363-364, is no less applicable today:

> * * * If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. * * *
>
> * * * Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

The possibility—which has always existed—that an individual prosecutor, in a particular case, might abuse his office and present weak evidence deliberately to a grand jury for ulterior motives (see *United States* v. *Payton*, 363 F. 2d 996, 999 (C.A. 2) (dissenting opinion), certiorari denied, 385 U.S. 993), hardly justifies an effort to overthrow the premises

upon which the constitutional system of indictment by grand jury rests.[3]

It is unnecessary to argue that there is no case in which a district judge would have power to step in and dismiss an indictment regardless of circumstances showing that the grand jury's action had been capricious. Even assuming that the rule leaves room for rare exceptions, the mere fact that witnesses at the trial did not personally appear before the grand jury—the only showing that petitioner did or could make—hardly amounts to a showing that the grand jury acted arbitrarily or capriciously. As we point out below, sworn affidavits by seven internal revenue agents that they accepted money from petitioner to influence official action meets the standard of probable cause which petitioner argues this Court should adopt as a basis for judicial review of grand jury action.

B. *The Indictment Was Properly Based upon the Testimony of an Internal Revenue Agent, Who Summarized for the Grand Jury Affidavits Made by Persons Who Were Indicted with Petitioner or under Indictment.*

The indictment, as noted above, was based upon the testimony of an internal revenue agent who summarized affidavits of the persons who were the principal witnesses at petitioner's trial. Six of these persons were indicted with petitioner and the seventh

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[3] The judge who impanels a grand jury may always instruct it, of course, concerning its obligations.

had been separately indicted. This testimony, we submit, furnished ample basis for the return of an indictment.

There was no apparent need for the prosecutor or the grand jury to insist on calling in person individuals whom they were planning to indict. The existence of wide-scale corruption in the Internal Revenue Service had already been established before a previous grand jury. It had heard the witnesses at an earlier stage in the investigation, including the supervisor, Levine, who had implicated petitioner. The prosecutor still had their sworn affidavits.

It was also eminently reasonable that the grand jury should conclude, on the basis of statements by seven internal revenue agents that each of them took money from petitioner to influence official action, that he was probably guilty of bribery. Each internal revenue agent who had furnished an affidavit not only ran the risk of losing his job because of his admission; he implicated himself in crime. The individual declarations, moreover, did not stand alone; each was buttressed by the others. Together, they furnished more than ample probable cause to believe that petitioner should answer to the charge of bribery.

It is true that the grand jury did not ask the revenue agent to produce the affidavits for its examination. But the grand jury was not required to be skeptical of the summary by the agent. The investigator did not simply say, as in *Aguilar* v. *Texas*, 378 U.S. 108, that he had information from an undisclosed source that petitioner had violated the law.

He did not attempt to usurp the function of the grand jury. He summarized affidavits which contained specific information showing in the most direct fashion that each declarant, as well as petitioner, had violated the law.

As this Court had said of probable cause, albeit in another context (*Brinegar* v. *United States*, 338 U.S. 160, 175):

> In dealing with probable cause, * * * as the very names implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

The preliminary proceeding to determine probable cause has never been considered the equivalent of a trial to determine guilt or innocence. See *McCray* v. *Illinois*, 368 U.S. 300. The proof of probable cause has, therefore, never been restricted by the rules governing the admissibility of evidence at a criminal trial nor by the requirement of proof beyond a reasonable doubt. See *Costello* v. *United States*, 350 U.S. 359, where this Court held that an indictment could properly be founded on the testimony of expert witnesses summarizing the results of an extended investigation. Therefore, even if it were the function of the district court (which we dispute) to undertake a review of the evidence heard by the grand jury, it seems perfectly apparent that this case more than

meets those requirements which pertain to a determination of probable cause.

### C. *There Is No Reason to Impute Bad Faith to the Prosecutor in Failing to Call before the Grand Jury Witnesses Who Were about to be Indicted.*

Petitioner charges that the use of an agent to summarize the contents of the sworn affidavits of the internal revenue agents who became government witnesses at the trial was part of a "policy designed to obviate the necessity of making grand jury testimony available to defense counsel." He furnishes no support for that accusation. He also ignores the fact that the witnesses in question were *de facto* defendants who were themselves indicted by the very grand jury which returned the instant indictment against petitioner. The courts have been critical of calling *de facto* defendants before a grand jury.[4] The witnesses who testified at petitioner's trial had been called before a previous grand jury at an early stage of the investigation. When they subsequently gave statements which implicated petitioner (among others) they were not again summoned—before another grand jury. We believe that this course was proper and that it most certainly will not support an inference of bad faith.

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[4] See, *e.g.*, *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *Powell* v. *United States*, 226 F. 2d 269 (C.A.D.C.); *United States* v. *Cleary*, 164 F. Supp. 328 (S.D.N.Y.), reversed, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936.

We point out, moreover, that the statements of the witnesses concerning payments by petitioner antedated the grand jury's consideration of petitioner's case. The prosecutor was obviously well aware that those statements would be available to the defense under 18 U.S.C. 3500. If each witness had been called and had summarized his affidavit for the grand jury, the defense would not have been in a position materially different from that which prevailed when the statement itself was turned over at the trial. In the case of two of the witnesses, the government also turned over transcripts of tape recordings made while these witnesses were being investigated by an undercover agent (Exs. 100, 120). There was no motive, therefore, for the government to take pains to avoid producing grand jury testimony in addition to other material known to be producible under 18 U.S.C. 3500. This is not a case where petitioner, without grand jury testimony, would have had no equivalent material available to assist him in his defense.

In light of the accusation directed against the United States Attorney in the Southern District of New York, the Solicitor General requested him to comment on this charge. A copy of his reply is printed in Appendix B. He has informed us that his office has never had a policy to avoid placing witnesses who have personal knowledge before the grand jury. He observes that, prior to the *Umans* decisions, numerous indictments were obtained through hearsay testimony, primarily in the cases which were referred to the United States Attorney after a thorough investi-

gation by one of the investigating agencies. In order to assist the grand jury in handling its large volume of cases expeditiously, the government would place before the grand jury the investigating agent who conducted the numerous interviews in connection with the investigation and who could, therefore, summarize the essential testimony of the various lay witnesses. Following the comments of the court of appeals in this case and in *United States* v. *Payton*, 363 F. 2d 996 (C.A. 2), the assistants in his office have been instructed to submit to the grand jury some first-hand testimony of actual witnesses except where serious difficulties or obstacles make this impracticable.

Even under a policy which strongly favors the calling of witnesses who have first-hand knowledge, there would be a strong countervailing consideration, we submit, in the case of witnesses who are themselves putative defendants.

## II

### The District Court Properly Declined to Turn Over Statements by the Witnesses Recounting the Acceptance of Bribes by Persons Other Than Petitioner

As noted above, the government, at the conclusion of the testimony of each witness, turned over statements by the witness recounting his dealings with petitioner. It also tendered the recordings made in the course of the investigation of two of the witnesses. The government did not turn over to the defense, but submitted to the court, the material presently before this Court under seal; it consists of

statements relating to the acceptance of bribes by the witnesses from persons other than petitioner. As previously observed (pp. 6-7, *supra*), some of the material which was turned over, including the testimony of the witnesses before a previous grand jury, also included accounts by some of the witnesses that they had accepted money from persons other than petitioner. Despite his awareness (not only from the material turned over, but from testimony of the witnesses at the trial of other defendants) that the witnesses had taken other bribes, petitioner never pointed out to the trial court why or how he believed that the additional statements as to these bribes would aid him in his cross-examination. He merely made a blanket demand for every statement made by each government witness, whatever its nature. We urge that the trial court's refusal to honor this sweeping demand was well within its discretion since there was no basis for concluding that the statements in question would provide additional aid in cross-examination of the witnesses. To the extent that petitioner, in this Court, improvises a theory as to their possible relevance on cross-examination, he is presenting an argument that he did not make to the trial court and one which, in our view, is not supported by the record.

### A. *Although 18 U.S.C. 3500 Requires the Production of Statements Useful for Cross-examination, It Was Designed to Avoid Production of Irrelevant Material, Particularly That Involving Needless Exposure of Other Persons.*

We agree with petitioner that, under 18 U.S.C. 3500, directing the production of any statement of the witnesses in the possession of the government "which relates to the subject matter as to which the witness has testified," the basic test is the relevancy of the statement to cross-examination of the witness. As stated in *Ogden* v. *United States*, 303 F. 2d 724, 740 (C.A. 9):

> * * * The problem is not whether a question framed precisely in the terms of the withheld information would relate to the subject matter of the direct examination, but rather whether the withheld material might be useful in framing questions which would be relevant to that subject matter. The appropriate analogy is found in Rule 16 of the Federal Rules of Criminal Procedure, and the proper inquiry is whether the omitted portions of the statement "may be material to the preparation" of proper cross-examination. Doubts are to be resolved in favor of disclosure, for the Court necessarily proceeds without the benefit of counsel's more intimate knowledge of the possible significance of particular information for purposes of impeachment. * * *

See also *Rosenberg* v. *United States*, 360 U.S. 367, 370. Indeed, the statutory language—"relates to the subject matter as to which the witness has testified"

—reflects the traditional formulation of the limits of cross-examination. See, *e.g.*, *United States* v. *Minuse*, 142 F. 2d 388, 389 (C.A. 2).

The history of the Jencks Act confirms the proposition that possible use in permissible cross-examination was the underlying function which the legislation sought to implement. In *Jencks* v. *United States*, 353 U.S. 657, there was no question that the documents would have been useful to the defense in the proper cross-examination of the principal government witness and therefore related to the subject matter of the witness' testimony. The reports and statements there withheld from the defense contained different accounts of the very events and activities as to which the witness had testified. Thus, the opinion states that "[r]elevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness." 353 U.S. at 669.

In order to confine production to pertinent matter which has a use in permissible cross-examination, Congress adopted this language of the *Jencks* case and restricted the production of statements of the witness to those "which relate to the subject matter as to which the witness has testified." The dual purpose was to guard against needless disclosure of confidential information while at the same time assuring that a criminal defendant had access to material "pertinent to the testimony of government witnesses." H. Rep. No. 700, 85th Cong., 1st Sess., p. 2. The

Senate Committee pointedly declared (S. Rep. 981, 85th Cong., 1st Sess. p. 5):

> It appears to the committee that, briefly stated, the theory of the majority of the Court is that if the Government sends into court a witness to testify against a defendant, and the Government has, at the same time in its files, an authenticated statement or report by the witness *having to do with the activities of the defendant*, the defendant is justified in asking for and receiving an order compelling the presentation in court of the material *if it relates to the testimony of the witness* * * *" (emphasis added).

The House Committee also showed its desire to avoid the needless exposure of the names of innocent persons. It included in its report a statement of the Attorney General that the proposed legislation would safeguard reports about other persons or other transactions. H. Rep. No. 700, 85th Cong., 1st Sess., pp. 3, 12. The Senate Report used as an illustration of extraneous matter which need not be produced statements about another check forgery for which the defendant was not being tried. S. Rep. No. 981, 85th Cong., 1st Sess., p. 7. The Act therefore established a procedure, followed here, whereby the trial court could examine material to determine whether production was required, without turning over to the defense every statement by the witness which might be in the government files.

### B. *Since the Material Withheld Did Not Bear on the Charge at Issue and Involved Persons Not on Trial, the Trial Court Properly Exercised Its Discretion in Declining to Turn It Over.*

The trial court properly exercised its discretion in refusing to turn over to petitioner materials which related details having nothing to do with petitioner, but involving other persons who dealt with the witnesses, some of whom were under indictment and awaiting trial. Petitioners had more than ample basis —from the materials turned over and by reference to other indictments and prior trials—for conducting cross-examination which would show that the witnesses had taken bribes from others. There was no reason to turn over materials which went beyond that and set out the details of other transactions not involved in this case. The trial court, which has always been accorded a broad discretion in fixing the limits of proper cross-examination, was justified in concluding that such collateral details were unnecessary and might injure the reputations of persons not involved in the instant proceeding.

As petitioner himself recognizes (Pet. Br. 37), a trial judge has a wide area of discretion as to whether to permit any impeachment at all on the basis of other similar acts of misconduct. There is no universal agreement that specific acts of misconduct, not resulting in a conviction, are an appropriate subject of cross-examination at all. Some cases forbid all such queries in the absence of a conviction. See *Homan* v. *United States*, 279 F. 2d 767, 771-772 (C.A. 8), certiorari denied, 364 U.S. 866; *United*

*States* v. *Provoo*, 215 F. 2d 531, 535-537 (C.A. 2). Other decisions place such an inquiry in the discretion of the trial judge and require that the inquiring party be bound by the answer of the witness. See *United States* v. *Irwin*, 354 F. 2d 192, 198 (C.A. 2), certiorari denied, 383 U.S. 967; *United States* v. *Sweeney*, 262 F. 2d 272, 276-277 (C.A. 3); *United States* v. *Sager*, 49 F. 2d 725, 730 (C.A. 2); *Pullman Co.* v. *Hall*, 55 F. 2d 139, 141 (C.A. 4); *Simon* v. *United States*, 123 F. 2d 80, 85 (C.A. 4), certiorari denied, 314 U.S. 694; *Coulston* v. *United States*, 51 F. 2d 178, 181-182 (C.A. 10). This form of cross-examination is restricted because it is collateral to the main inquiry and is subject to the danger that it may confuse the issues and prolong the trial. In some instances, it may engender or open up false charges against the witness and persons said to have participated with him in his alleged misconduct.

As in the case of cross-examination itself, the production of statements not directly relating to the charges at issue must rest in the discretion of the trial court. As stated in *Palermo* v. *United States*, 360 U.S. 343, 353:

> * * * Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts.

If the rule were otherwise, the government would be compelled to turn over documents to the defense

which would serve no function in proper cross-examination. To be sure, production of statements may be somewhat broader than their permissible use on cross-examination. Nonetheless, production presupposes a reasonable likelihood that the documents might be useful to an examination which the court would permit. Surely the court need not order the production of statements which go to matters which the court would not, or need not, permit counsel to pursue on cross-examination.

C. *Petitioner's Present Theories Concerning the Need for the Withheld Material on the Basis of the Particular Answers Given by the Witnesses at Trial Were Not Advanced to the Trial Court and Are Not Supported by the Record.*

In this Court petitioner advances various arguments as to the possible utility of the withheld statements, pointing to alleged deficiencies in the responses of the witnesses given at the trial. He alleges that the absence of the withheld material impeded him in framing proper questions to some witnesses and in attacking the credibility of others. We submit that this is an effort to construct on appeal an argument of necessity which never occurred to counsel at the trial, where, presumably, the necessity would be evident. In fact, at trial, petitioner presented no argument showing a need for statements implicating other taxpayers or taxpayers' representatives; he merely made a blanket demand for every statement given by the witness. If there was some particularized need, not readily apparent, why trial counsel felt he had to have the details as to such other transactions, it

was his duty to call the court's attention to the reasons. As we have pointed out, this is not a case in which it could be said that a need for material involving other persons should have occurred to the judge *sua sponte;* to the contrary, nothing in the case or in the testimony of the witnesses would suggest the need to go into these details. In such circumstances, counsel is not entitled to rest on his blanket demand in the hope that some justification will occur to him later.

In addition, the record fails to support petitioner's belated attempt to show need for the material in question.

1. As to two of the witnesses, Ellington and Levine, the claim is made that, since no questions were asked in cross-examination about other bribes, petitioner was left completely in the dark about other payments. But petitioner was given Exhibits 106 and 107 (R. 48), in which Ellington detailed his acceptance of bribes from two accountants and his acceptance of a gift from a third. Petitioner was also given Levine's earlier grand jury testimony where he admitted receiving money from petitioner and two other accountants (Exs. 148, 145). He also knew that Levine had been indicted in another case (R. 97). There was thus no reason why petitioner could not have cross-examined these witnesses along these lines to the same extent as he did the other witnesses.

2. As to other witnesses, petitioner established that they had taken bribes and had not reported these bribes as taxable income (see, *e.g.*, Tr. 95). As we

have pointed out, he had no absolute right to pursue further cross-examination on this subject. Further testimony about other specific acts of misconduct would have confused the issues involved in this case, leading to the trial of the ultimate issues involved in other bribery cases. There is thus no merit in petitioner's suggestion that the testimony of three of the witnesses that they were named in other indictments and were cooperating with the government broadened the subject matter of their direct testimony so as to open up the whole range of inquiry into the details of other bribes, albeit those details had no relation to the facts here at issue.

3. Petitioner argues (Pet. Br. 42-49) that he needed the statements because the witnesses were more "precise" in their testimony as to their dealings with petitioner than they were as to their dealings with other accountants. Actually, as his own summary of their cross-examination shows, they were rather imprecise as to the total amounts taken and as to the dates, but not in answering the question whether they took money from others. How it would have aided the defense to confront the witnesses with prior statements which might have refreshed their recollection as to specific dates and payments, instead of arguing to the jury the possible implications of the allegedly greater specificity in their recollection of transactions involving petitioner, is unexplained. Be that as it may, petitioner's argument itself shows how far afield any cross-examination based on the specific facts of other transactions would have taken the trial. To go into minute details as to the amounts

and dates of other payments would have unduly and unnecessarily complicated a trial which related to petitioner alone. The trial judge was under no obligation to permit such a collateral excursion.

## III

### Petitioner Was Not Convicted of Mutually Inconsistent Crimes.

A. Counts 10 through 12 charged petitioner, under 18 U.S.C. 201(f), with making payments to the auditors "for and because of official acts performed and to be performed by said public officials, to wit, the office audit" of income tax returns (R. 7-8). Counts 25 through 27 charged, under 18 U.S.C. 201 (b), that he made the same payments "with intent to influence official acts, to wit, the office audit" of income tax returns (R. 10-11). Petitioner contends that neither his convictions under 18 U.S.C. 201(f) nor his convictions under 18 U.S.C. 201(b) can stand because the subsections define mutually inconsistent claims.* The court of appeals rejected this argument, concluding that Section 201(f) defined a lesser-included offense under Section 201(b). Finding that "[t]here is no reason to believe that Congress intended that there should be concurrent convictions

---

*The Court need not consider all of the arguments that petitioner directs at various counts of the indictment. Since petitioner received concurrent sentences, the judgment may be affirmed if any one of these contentions is rejected. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339, 362. As pointed out *infra*, p. 33, one of the contentions now made was not presented in the petition for a writ of certiorari.

and sentences under both sections" (R. 144), it vacated the sentences on the lesser (Section 201(f)) counts. The conclusion of the court below that there was no repugnancy between the sections is supported both by the language and legislative history of the statute.

The statute was enacted by Congress in 1962 as part of a bill "to strengthen the criminal laws relating to bribery, graft, and conflicts of interest * * *." S. Rep. No. 2213, 87th Cong., 2d Sess., p. 1. The bill contained a variety of sanctions appropriate for different degrees of delinquency. Section 201(b)(1) proscribes payments with the intent "to influence any official act," and fixes a maximum penalty of fifteen years' imprisonment. Section 201(f) relates to payments "for or because of any official act" and provides a maximum penalty of only two years. The former aims at the act of corruptly giving money to a public official with *intent to influence action*. The latter deals with gifts made to a public official for his official acts. It requires no proof of intent to influence official action. See *United States* v. *Irwin*, 354 F. 2d 192, 196-197 (C.A. 2), certiorari denied, 383 U.S. 967. A finding by the jury that petitioner gave money to the various agents in violation of 18 U.S.C. 201(f) would not preclude the further finding that the money was given corruptly with intent to influence their official action in violation of 18 U.S.C. 201(b).

Petitioner's argument to the contrary rests upon a misreading of Section 201(f). In his view (Pet. Br.

50-52), that section proscribes a payment for a "proper" discharge of an official act. However, the quoted phrase, is part of a clause—"otherwise than as provided by law for the proper discharge of official duty"—language plainly designed only to exclude from the section's coverage whatever payments might be made to an official in the normal course of his duty, such as his salary and fees. The House Committee report expressly states (H. Rep. No. 748, 87th Cong., 1st Sess., p. 19):

> * * * The phrase "otherwise than as provided by law for the proper discharge of official duty" is used in subsections (f) and (g) in order to permit lawful payments for the performance of official acts. The conduct which is forbidden has the appearance of evil and the capacity of serving as a cover for evil. * * *

Thus, Congress has concluded that any payment, whatever the motive, to a federal employee for the performance of his official acts is an evil and should be deterred. If, however, the payment is coupled with the added element of an intent to influence official action, the crime becomes aggravated and a heavier penalty may be imposed. There is nothing inconsistent in this scheme.

B. Counts 1 through 9 charged petitioner with aiding and abetting a named internal revenue agent in receiving fees not prescribed by law for the performance of a duty, in violation of 26 U.S.C. 7214(a)(2) and 18 U.S.C. 2 (R. 6-7). Counts 16 through 24 covered the same transactions, and charged that petitioner paid the internal revenue agents with intent to in-

fluence their action in a matter pending before them in their official capacities, in violation of 18 U.S.C. 201, as it existed prior to the effective date of the 1962 amendments (R. 9-10). Petitioner contends that these counts are inconsistent with each other in the same manner as the counts arising out of the amended bribery statute. This issue is not properly here since it was not presented in the petition for a writ of certiorari. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362, note 16; *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 96, note 1; *Irvine* v. *California*, 347 U.S. 128, 129-130 (plurality opinion of Mr. Justice Jackson); Rule 23-1(c) of the Rules of this Court. Petitioner has not shown "exceptional circumstances" requiring this Court to rectify "plain error" or errors which "seriously affect the fairness, integrity of public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160; *Silber* v. *United States*, 370 U.S. 717; *Duignan* v. *United States*, 274 U.S. 195, 200; Rule 40-1(d)(2) of the Rules of this Court.

In any event, an examination of the two statutes shows that petitioner's argument lacks merit. Again, petitioner's argument rests upon the misconception that Congress meant to distinguish between "proper" and improper payments to government officials for the performance of official duties. Congress, however, made no such distinction. As 26 U.S.C. 7214 shows on its face, all payments to officials are viewed as an evil except payments "as by law prescribed for

the performance of any duty." The other statute, 18 U.S.C. 201 (as it read until January 20, 1963), requires a payment "with intent to influence" official action, *infra*, p. 37. There is thus, as the court of appeals said, "no contradictory elements of required proof between the two statutes; only additional elements of proof" (R. 142-143).

## IV

### Petitioner Could Properly Be Convicted of Aiding and Abetting the Receipt of Illegal Fees by Internal Revenue Agents.

Petitioner also argues that under Counts 1 through 9 he could not be convicted as an aider and abettor of the Internal Revenue agents who received money from him because Congress did not intend to cover such conduct under the aider and abettor statute, 18 U.S.C. 2. However, the history of the 1951 amendment to the aider and abettor statute removes any possible doubt that petitioner was properly convicted.

Prior to 1951, 18 U.S.C. (1948 ed.) 2(a) provided: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal." In 1951, Congress concluded that the statute might be subject to the interpretation that a person incapable of being a principal could not be an aider and abettor. It therefore changed the statute to make the aider and abettor "punishable as a principal" rather than "a principal." In explaining the need for this amendment, the Senate Committee stated (S. Rep. No. 1020, 82d Cong., 1st Sess., pp. 7-8):

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks. (footnotes omitted.)

Congress thus expressly declared that it wished to make certain that aiders and abettors could be punished even though they were incapable of committing the specific violation which they were charged with having aided and abetted. Therefore, petitioner, having made payments which he knew the agents could not lawfully receive, was properly convicted as an aider and abettor of the agents' receipt of illegal fees. *United States* v. *Kenner*, 354 F. 2d 780 (C.A. 2), certiorari denied, 383 U.S. 958; *May* v. *United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830; see also *United States* v. *Johnson*, 337 F. 2d 180 (C.A. 4), certiorari denied *sub nom. Edlin* v. *United States*, 385 U.S. 846.[6]

---

[6] The conspiracy cases relied upon by petitioner are not in point. They simply hold that a person may not be found guilty of conspiracy where the same agreement is a necessary element of the substantive offense.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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*Acting Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
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*Attorneys.*

SEPTEMBER 1967

## APPENDIX A

18 U.S.C. (1958 ed.) 201, in effect prior to January 21, 1963, provided:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.
>
> * * * *

18 U.S.C. 201, 76 Stat. 1119 (effective January 21, 1963) provides in part:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official * * * with intent—
>
> (1) to influence any official act * * *
>
> * * * *

Shall be fined not more than $20,000 * * * or imprisoned for not more than fifteen years, or both * * *.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official * * * for or because of any official act performed or to be performed by such public official * * *

* * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

26 U.S.C. 7214 provides in part:

(a) Unlawful acts of revenue officers or agents.

Any officer or employee of the United States acting in connection with any revenue law * * *

* * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; * * *

* * * *

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

APPENDIX B

August 21, 1967

Thurgood Marshall, Esq.
Solicitor General of the United States
Washington, D. C. 20530

Re: Grand Jury Practice in the Southern District of New York

Dear Mr. Marshall:

We have given careful attention and consideration to the questions put in your letter of August 1, 1967 with respect to our practice before the grand juries.

You ask whether there was a policy in the Southern District of New York of avoiding placing witnesses who have personal knowledge before the grand jury. There is not and was not a policy in effect designed to secure that end. Needless to say, prior to the decision of the Second Circuit Court of Appeals in *Umans*, numerous indictments were obtained through hearsay testimony. However, where this was so, it was generally motivated by extremely difficult organizational problems of time and convenience in grand jury practice in the Southern District rather than by a policy of keeping witnesses with personal knowledge from testifying.

During most of the year, grand juries in the Southern District have their schedule booked up two and three weeks in advance, largely due to the press of daily cases of thefts from the mails, thefts from interstate shipments, forging of Government checks and sales of narcotics. The regular grand juries serving during the busy months commonly return an average of seven or eight indictments per day. Reliance on solely first-hand personal knowledge testimony in these daily cases of overwhelming number

would decimate the efficiency and productivity of the grand juries since it would gen( ally require the appearances in each case of three or four different witnesses who are not in Government service and whose inexperience in such proceedings would tend to slow them down even when the witnesses were available.

In the ordinary cut and dried case in which the facts are referred to the United States Attorney only after a thorough investigation by one of the investigative agencies, it has never been and it never should be the practice to try the merits of the case before the grand jury. The practice rather has been to present before that body a concise showing of the existence of clearly sufficient probable cause. It was primarily in those cases that the heaviest reliance was placed on the use of hearsay since enormous gains of convenience and efficiency were accomplished by placing before the grand jury the investigating agent who conducted the numerous interviews in connection with the investigation and who could, therefore, summarize the essential testimony of the various lay witnesses to show probable cause.

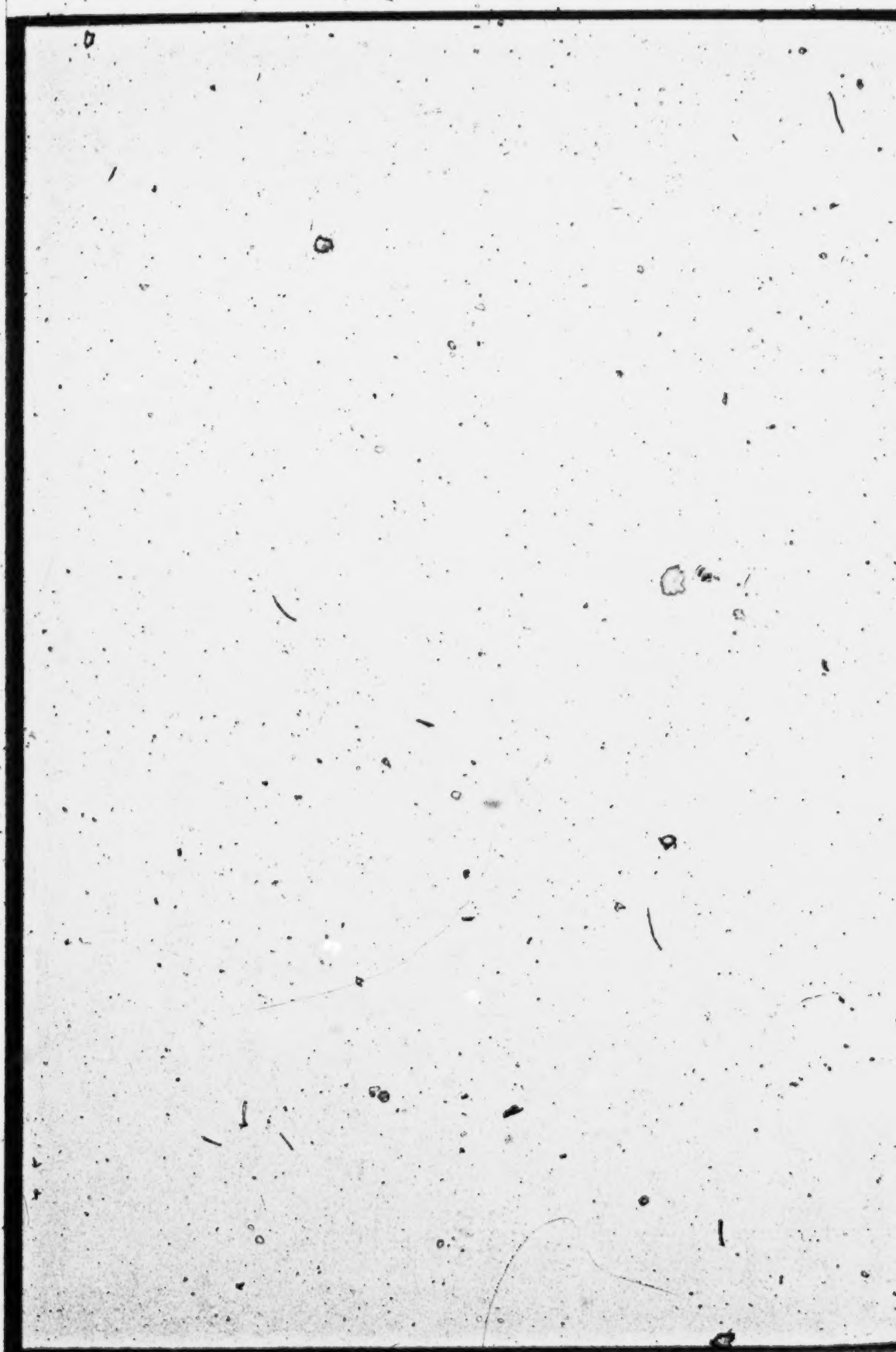
Since the decisions of the Second Circuit Court of Appeals in *Umans* and *Payton*, however, Assistants in this office have been given clear and unequivocal instructions to submit to the grand jury some firsthand testimony of actual witnesses except where serious practical difficulties or obstacles make this impracticable. To my knowledge this practice is being uniformly followed.

I hope this information will be helpful to you.

Very truly yours,

ROBERT M. MORGENTHAU
United States Attorney

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 41

SAM UMANS,

Petitioner,

*v.*

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

### Statement

This brief is submitted in reply to the brief submitted on behalf of the United States.

### Argument

**1. A government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, is insufficient evidence to support an indictment.**

The Government argues that since there is no cross-examination or other means of testing evidence through an adversary process in the grand jury, no formalized requirements as to the kind or quantum of evidence were

intended and the protection to the accused lies solely with the "conscience of each member of the grand jury" (Gov't Br. p. 13). The same argument could be made in opposition to challenged search and arrest warrants based upon affidavits of law enforcement officers or other persons. There is no cross-examination or testing through an adversary process of the person who submits an affidavit in support of a warrant. Nevertheless, judicially enforceable standards are imposed upon law enforcement officials to insure that the individual's constitutional right to be free from arrests and searches, except on probable cause, is protected. The safeguard to the accused to be free from arrests, searches and indictments except on probable cause should lie not only with the conscience of the police officer and the prosecutor but in a very material way with the imposition of reasonable judicially enforceable standards, without which the right to be indicted by a grand jury becomes an empty shell.

The Government argues that there was no need for the prosecutor or the grand jury to call the witnesses who furnished affidavits because the existence of "wide scale corruption" in the Internal Revenue Service had been established before a previous grand jury and it was reasonable that the grand jury which indicted petitioner should conclude "on the basis of statements by seven internal revenue agents that each of them took money from petitioner to influence his official action, that he was probably guilty of bribery" (Gov't Br. p. 16). There are several reasons to reject this argument. First, not only is there nothing in the record to support the conclusion that wide scale corruption had been established before a different grand jury but, in addition, no evidence before a grand jury other than the one which returned the indictment here should be used to support the indictment in this case. Second, even if the grand jury that indicted petitioner heard evidence of wide spread corruption in the Internal Revenue Service, that is no reason to enmesh any particular individual in the web of that corruption on the flimsy

evidence presented to the grand jury in this case. Third, it is inaccurate to state that the grand jury concluded that petitioner was "probably guilty" of bribery on the basis of statements by seven internal revenue agents (Gov't Br. p. 16). This grand jury did not have before it the statement of any one of the internal revenue agents. Instead, it had a government employee's brief summary of pieces of paper which purported to be affidavits of these witnesses.

The Government in its brief to the Court of Appeals and in its brief to this Court has made statements about the evidence before the grand jury which returned the indictment in this case. In the Court of Appeals the Government characterized the testimony as a revenue agent's brief summary of affidavits. In this Court the Government states in its brief that the grand jury did not ask the revenue agent to produce the affidavits for its examination and that the agent who testified before the grand jury did not simply say that he had information from an undisclosed source that petitioner had violated the law (Gov't Br., pp. 16-17). The Government does not state who he was or what he did say. However, it is apparent that the agent, whoever he was, did not witness the vast majority of the affidavits he summarized and probably never spoke to or saw most of the witnesses whose affidavits he summarized. The affidavits contain the names of the Government agents who witnessed them. (See Gov't Exhs. 101, 108, 119A, 126, 149). Most of the affidavits have the names of different agents so that there is no one agent who witnessed more than a few of the affidavits. The agent who testified, if he interviewed any witnesses at all, necessarily had no personal knowledge of most of the pieces of paper he was summarizing. Under the circumstances here, we respectfully urge this Court to direct the Government to furnish it and petitioner with a copy of the grand jury minutes, which must be brief indeed, because of the brevity of the portions of affidavits to which the Government alleges were summarized.

The Government argues that all of the individual declarations of the witnesses who later testified at the trial were buttressed by the others and together furnished more than ample probable cause that the petitioner should answer to the charge of bribery (Gov't Br., p. 16). That argument fails to distinguish between the evidence in the Government's files and the evidence before the grand jury—two vastly different things. See *Aguilar* v. *Texas*, 378 U. S. 108, 109, fn. 1 (1964). It also shows that the Government equates the two and thereby usurps the function of the grand jury.

Whether or not the affidavits of the witnesses, had they been presented to the grand jury and properly identified by the agents before whom they were sworn, would have furnished probable cause to indict is not the question here. Whether or not the internal revenue agents before whom the affidavits were sworn had probable cause to believe that petitioner was guilty of the crimes charged is not the question here. The issue is whether the brief summary of the agent, which is all the grand jury heard, was sufficient and for the reasons stated in our main brief we believe that it was not.

The Government suggests that the witnesses who later testified at trial were not summoned to the grand jury because courts have been critical of calling *de facto* defendants before grand juries. First, it is not necessary to support our position for the Court to hold that the Government was required to call these witnesses before the grand jury. Second, the Government's position is inconsistent because, as the Government admits (Gov't Br., p. 18), these *de facto* defendants were called before a previous grand jury and their testimony shows that they were *de facto* defendants at that time since each of them admitted taking money from accountants. Third, there can be no criticism of the Government for calling *de facto* defendants before a grand jury if those persons are advised of their rights, are advised that they will be indicted, and are rep-

resented by counsel. See *United States* v. *Cleary*, 265 F. 2d 459 (2d Cir.), cert. denied 360 U. S. 936 (1959). Obviously, those witnesses thought that they would benefit from their cooperation with the Government and, after the trial of this case, each of them received suspended sentences. Fifth, if there is to be criticism of the Government for calling *de facto* defendants before the grand jury, the same criticism can be leveled at it for extracting the affidavits at a time when the witnesses were *de facto* defendants.

The Government states that with one exception the grand jury testimony and the grand jury exhibits of the witnesses who testified before a previous grand jury dealt with transactions with other accountants. The fact is that before the previous grand jury the witnesses were asked to state the names of the accountants from whom they took money. Six out of the seven witnesses who testified before the previous grand jury failed to mention petitioner's name. While those witnesses who did not mention petitioner said, upon prodding by the prosecutor, that there were other transactions which they could not then recall, all but one of the persons who later swore to affidavits implicating petitioner failed to mention petitioner. In addition, the Government did not have its agent summarize the witnesses' affidavits before the same grand jury which heard their live testimony in which they failed to mention petitioner. Instead the agent presented a summary of affidavits to a new grand jury which had no way of knowing that six of the seven witnesses failed to name petitioner when testifying under oath at a previous time. Even assuming that the first grand jury expired when the second grand jury presentation was made, the Government could have informed the second grand jury of the prior testimony. This information might have motivated the grand jury to ask searching questions about the Government's procedure. We believe that under the circumstances of this case the Government was under a duty to inform the new grand jury of the prior grand jury testimony of these witnesses. *Cf. Brady* v.

*Maryland*, 373 U. S. 83 (1963), particularly, as this Court has recognized, because these witnesses, allegedly accomplices of petitioner, often have "a greater interest in lying in favor of the prosecution rather than against it. . . ." *Washington* v. *Texas*, 388 U. S. 14, 22 (1967).

The Government argues that the prosecutor knew that the affidavits of the witnesses would be furnished to petitioner at trial and therefore the prosecutor was not motivated to have affidavits summarized to avoid having grand jury testimony of these witnesses produced at trial (Gov't Br. p. 19). However, we urge that the Government was motivated by a desire not to create grand jury testimony which might have been inconsistent with the affidavits, particularly in the light of the fact that the witnesses had testified once before and six out of seven of these witnesses failed to mention petitioner.

The Government has appended to its brief a copy of a letter, not part of this record, from the United States Attorney for the Southern District of New York to the Solicitor General about his practice before the grand juries. The United States Attorney denies that there was a policy in effect designed to avoid placing witnesses who have personal knowledge before the grand jury. However, no matter what motivated the United States Attorney's policy before this case, the result was apparently to have most indictments returned without the grand jury hearing any first hand testimony. Thus, the United States Attorney states that "in the ordinary cut and dried case" the practice in the Southern District of New York has been to present before the grand jury, using hearsay evidence, "a concise showing of the existence of clearly sufficient probable cause." We are not told what standards of probable cause the United States Attorney used.

It is important to note that not only is the Government silent about its practice in other jurisdictions in the country but the United States Attorney in the instant case apparently did not follow the procedure outlined in his

letter. He states in the letter that when hearsay was presented he would place before the grand jury "the investigating agent who conducted the numerous interviews in connection with the investigation and who could, therefore, summarize the essential testimony of the various lay witnesses to show probable cause." However, as we explain above, the agent who testified in this case, at best, only interviewed one or possibly two of the witnesses whose affidavits he was summarizing.

The letter from the United States Attorney does indicate that in what is probably the busiest jurisdiction in the country, the grand jury can properly function under a standard of evidence which we are proposing. Thus the letter states that since the decision in the Second Circuit in the *Umans* and *Payton* cases, Assistant United States Attorneys have been instructed to submit to grand juries some first hand testimony of actual witnesses except where serious difficulties or obstacles make this impractical. This of course may go a long way towards insuring an accused of his constitutional right to be tried by a grand jury. But we think this practice should not be at the grace of each of the many prosecutors in the country but should rather be a requirement under the Constitution or at least under edict of this Court under its rule-making power.

**2. Statements of witnesses in which they admitted committing other crimes involving moral turpitude should have been submitted to petitioner.**

The Government argues that petitioner "never pointed out to the trial court why or how he believed" that the statements of the witnesses which were withheld from petitioner would aid him in his cross-examination and that petitioner merely made a blanket demand for every statement by each government witness, whatever its nature; the Government also urges that petitioner is making an argument in this Court about the utility of the statements not made to the trial court (Gov't Br. p. 21). Petitioner first learned the nature of the withheld statements from the

Government's brief filed in the Court of Appeals. The Government in effect would have this Court amend the Jencks Act 18 U.S.C. § 3500 by adding a requirement that defendants, who have no knowledge of the contents of statements which are not submitted to them, inform the trial court of the manner in which they intend to use statements which they have never seen. There is no such requirement in the Jencks Act and indeed such a requirement would destroy the effectiveness of that statute. The Jencks Act merely requires the defendant to move to produce any statement which comes within the Act and no further showing is necessary. In this case such application was made after the direct testimony of each of the witnessess.

To this very day, without having seen the statements, it is difficult to articulate all of the areas in which they may have been useful. However, in addition to the reasons given in our main brief, it is quite likely that some or all of the statements which fail to refer to petitioner purport to list all of the instances in which the witness received payments from accountants. Effective use for impeachment purposes could have been made of those statements by showing that at one or more times when the witness was purportedly listing each payment he received he failed to mention petitioner.

The Government cites inapplicable legislative history to support its position that the statements petitioner seeks are not within the Jencks Act. Thus, the Government cites a Senate Report which used as an illustration of extraneous matter which need not be produced, statements about another check forgery for which the defendant was not being tried. S. Rep. No. 981, 85th Cong., 1st Sess., page 7. That statement, however, was prepared by a Secret Service agent and contained information about a different check forgery by the defendant about which the agent had not testified and which was not part of the accusation. Obviously, the testimony of the Secret Service agent could not

be impeached by the fact that his report contained evidence that the defendant committed other crimes. In the instant case, the reports in question show that the witnesses, not the defendant, committed other crimes and are relevant for impeachment purposes.

The House Report on the bill which subsequently became the Jencks Act, relied upon by the Government (Gov't Br. pp. 23-24), specifically states that the purpose of the legislation is to establish a statutory procedure for the production of statements of Government witnesses for the use by defendants "who seek to attack the credibility of such witnesses." H. Rep. No. 700, 85th Cong., 1st Sess., page 2. It also shows that the kind of reports which Congress was concerned with protecting from public disclosure were reports prepared by investigatory agencies containing "all information received, whether relevant or not and whether verified or not . . ." which would not only reveal confidential information but which "would also reveal law-enforcement techniques intelligence sources, and the names of confidential informants. . . ." *Id.* at page 3. The withheld reports in this case merely contain statements about error to fail to produce them.

## CONCLUSION

**For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the indictment should be quashed.**

Respectfully submitted,

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Counsel for Petitioner.

October 1967.

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1967

No. 41

SAM UMANS,

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*against*

UNITED STATES OF AMERICA,

Respondent.

**~~MOTION FOR LEAVE TO FILE AND~~ PETITION FOR REHEARING OF ORDER DISMISSING WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED**

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1967

No. 41

SAM UMANS,

Petitioner,

*against*

UNITED STATES OF AMERICA,

Respondent.

## MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DISMISSING WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

### Motion for Leave to File Petition for Rehearing.

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court entered on November 6, 1967 dismissing as improvidently granted the petition for writ of certiorari in this case entered on February 27, 1967. Rehearing is sought to present other substantial grounds available to petitioner but not previously presented, to wit: that the Court below erred in refusing to inspect the grand jury minutes upon petitioner's showing that none of the witnesses who testified before trial testified before the grand jury that indicted petitioner. This raises the broad question of what showing

of insufficiency of evidence before the grand jury must be made to obtain an inspection of the grand jury minutes either in camera or by petitioner. This question also is raised in *Brown* v. *United States*, petition for cert. filed 35 U.S.L. Week 3377 (Apr. 14, 1967) (No. 1270, 1966 Term, renumbered No. 88, 1967 Term), but has not yet been decided by this Court.

We respectfully urge that the Court below abused its discretion in refusing to inspect the grand jury testimony, and request the Court to consider that question or to remand the case to the lower court with instructions to make the grand jury testimony part of the record and to consider petitioner's motion to quash the indictment in the light of that testimony.

Dated: November 1967.

EDWARD BRODSKY,
Counsel for Petitioner.

## PETITION FOR REHEARING OF ORDER DISMISSING THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

Petitioner prays that this Court grant rehearing of its order of November 6, 1967 dismissing the writ of certiorari as improvidently granted and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit.

### Reasons for Granting Rehearing and Issuing the Writ

The first question in the petition for writ of certiorari filed by petitioner and granted by this Court, and the first question in petitioner's brief filed on the merits, was whether or not a government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, was sufficient evidence to support an indictment. The grand jury testimony was not a part of the record in the Court below.' Petitioner knew the content of the grand jury testimony only from a statement in the Government's brief in the Court of Appeals and from statements made in the Government's brief on the merits in this Court. Petitioner, without presenting the point to this Court, assumed that a statement in the Government's brief would be sufficient to have the point considered by this Court, c.f. *Mesarosh* v. *United States*, 352 U. S. 1, 3 (1956) and did not ask this Court to grant certiorari on that point. Petitioner briefed the grand jury point on the merits in this Court assuming that the Government's characterization of evidence before the grand jury was sufficient to raise the point. Petitioner also briefed on the merits the three other points on which the Court granted cer-

tiorari.[1] There was no suggestion from the Government or from the Court in any of the questions on oral argument that certiorari had been improvidently granted. Nevertheless, the Court dismissed the writ of certiorari.

Thus, the question of whether or not it was error under the circumstances of this case, for the Court below to refuse to inspect the grand jury minutes has not been previously presented to this Court and we respectfully urge this Court to grant a writ of certiorari on that question.

In the Court below, petitioner asked each witness whether or not he testified before the grand jury that indicted petitioner and each witness testified that he did not appear before the grand jury that indicted petitioner (R. 106a). Because no witnesses who appeared at the trial testified before the grand jury, petitioner demanded to inspect the grand jury testimony or at least to have the Court inspect the grand jury testimony in order to determine what, if any, evidence the grand jury heard to support the indictment (*Ibid.*). The Court below denied petitioner's request (*Ibid.*).

It may be argued that despite the Government's characterization of the grand jury testimony in its briefs, the

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[1] The four points in the petition for writ of certiorari granted by this Court were the following:

1. Is a Government agent's "brief summary" of witnesses' affidavits, being the entire grand jury testimony, insufficient to support an indictment?
2. Should statements of Government witnesses admitting prior illegal acts involving moral turpitude have been made available to the defense under the Jencks Act?
3. Was petitioner, who allegedly paid money to Government officials, improperly convicted of aiding and abetting violations of Title 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two persons?
4. Was petitioner improperly convicted of violations of Title 18 U.S.C. § 201(f) and, on the identical facts, for violations of Title 18 U.S.C. § 201(b) which statutes are materially inconsistent?

sole question before this Court with respect to the grand jury issue in petitioner's writ of certiorari should have been whether or not it was error for the Court below to refuse to permit petitioner to inspect the grand jury testimony. Thus, the broad question is—what showing of insufficiency of evidence before the grand jury must be made in order to obtain an inspection of the grand jury minutes so that an accused may intelligently brief and argue the point. Since the accused has no way of determining before trial the evidence upon which the indictment is founded, a showing that no witnesses who testified at the trial testified before the grand jury should always be sufficient to cause an inspection to be conducted of the grand jury minutes. This is a point which our research discloses never before has been considered or passed upon by this Court. If there are no circumstances under which an accused may compel the inspection of grand jury minutes to determine what, if any, evidence the grand jury heard to support an indictment then the Fifth Amendment right not to be indicted for an infamous crime unless on a presentment or indictment of a grand jury is illusory. With no guidelines set by this or any other Court it is impossible for an accused to know when, if ever, this Court or any other Court will consider the question of sufficiency of evidence before the grand jury. This leaves the state of the law in confusion because there are no standards to follow.

The Court of Appeals in the instant case, although refusing to quash the indictment, recognized that "excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford the innocent" (R. 146).

The question of what showing of insufficiency of evidence must be made in order to obtain an inspection of the Grand Jury minutes has been presented to the Court in the peti-

tion for writ of certiorari in *Brown* v. *United States, supra.* There, the question presented is, "Whether an indictment is sufficient if the only evidence before the Grand Jury is the hearsay testimony of a government agent and the transcripts of testimony before a prior Grand Jury? And, if not, whether the trial court must examine the Grand Jury minutes to determine the indictment's sufficiency?" The petition for a writ of certiorari in *Brown* was filed on April 14, 1967 but has not yet been decided by this Court. If the petition in that case is granted, a decision in that case might control the issues presented by the Grand Jury question in this case.

We ask the Court to grant a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit. Alternatively, we request that the case be remanded to the lower court with instructions to make the Grand Jury testimony a part of the record in this case and to decide petitioner's motion to quash the indictment in the light of the Grand Jury testimony.

## CONCLUSION

For the reasons set forth above, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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WILLIAM ESBITT,
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655 Madison Avenue,
New York, N. Y. 10021.

## Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Counsel for Petitioner.